Supreme Court, U.S.
FILED

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No. 95-342 AUG 23 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TERRY L. THOMPSON, et al. *Petitioners,*

vs.

THE CITY OF SAN JOSE, *Respondent.*

Petition for Writ of Certiorari to the Court of Appeals of the State of California

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PETITION FOR WRIT OF CERTIORARI

MICHAEL MILLEN
(Counsel of Record)
12 South First Street,
Suite 810
San Jose, CA 95113
(408) 998-3262

Attorney for Petitioners

63 pp

QUESTIONS PRESENTED

1. Is an ordinance which prohibits "targeted picketing" within 300 feet of a "targeted residence" an unconstitutionally overbroad restriction on peaceful speech activity?

2. Is an ordinance which defines "targeted" picketing as "picketing which is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling," unconstitutionally vague?

3. Is an ordinance impermissibly content-based where the City Attorney has represented to lower courts that the City will look to the content of the speech in enforcing the ordinance?

PARTIES

In addition to the parties appearing in the caption of the case, the parties to the proceedings below include the Superior Court of the County of Santa Clara, and real parties in interest Joseph Patrick Vessels, Christopher Brown, George Linburg Allen, Julius Bahl, Michael Christian Ross, Abner Warner, Colleen Marie White, Murphy Karczewski, Andrea Lynn Spakousky, Douglas K. Theobald, Timothy Dee Wilson, Charles Carlson, Mary Alida Mueller, Lynn Turner Weber, and D.J. Bahl. None of the petitioners is a corporation.

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No. _____

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Petition for Writ of Certiorari to the Court of Appeals of the State of California

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Sixth Appellate District of the Court of Appeal of California is published at *City of San Jose v. Superior Ct.* (*Thompson*), 32 Cal. App. 4th 330, 38 Cal. Rptr. 2d 205 (1995) (App. 1a). The decision of the court of appeal denying rehearing (App. 39a) the decision of the Supreme Court of California denying review (App. 40a) and the decision of the Superior Court of Santa Clara County (App. 15a) are unpublished.

JURISDICTION

The Court of Appeal of California entered its decision on February 15, 1995. The Supreme Court of California denied review on May 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 9, 1993, Respondent City of San Jose [hereinafter, "the City"], amended Title 10 of the San Jose Municipal Code to add a section prohibiting "targeted residential picketing." The section was enacted by the City Council as an "emergency" provision, but was subsequently adopted as a regular amendment to the municipal code.

Section 10.09.010 provides, in pertinent part: "No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling. . . . For purposes of this Chapter, the term 'targeted' picketing means picketing activity that is targeted at a residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling." § 10.09.010(A,C).

The Court of Appeals has definitively interpreted § 10.09.010 as establishing a "300-foot buffer zone" around residences, in which all "targeted" picketing is prohibited. App. 6a.

On July 10, thirteen of the petitioners went to the neighborhood of Hoover and Harding Avenues in San Jose in order to picket. They arrived about 8:30 A.M. They walked through the neighborhood in a quiet and peaceful manner, carrying signs. They did not stop in front of any house, nor did they block any sidewalks. They were arrested by the police and charged with violating § 10.09.010 in that they had engaged in targeted picketing of 798 Harding Street within 300 feet of the residence.

On July 15, the remaining three petitioners were arrested as they walked, carrying signs, down the sidewalk on the opposite side of the street from 798 Harding Avenue. They were also charged with violating section 10.09.010.

Petitioners demurred to the charges, on the grounds that § 10.09.010 was an unconstitutional restriction on protected speech activity. Specifically, petitioners argued that 1) the ordinance was overbroad in imposing a 300-foot barrier around a "targeted" residence; 2) the ordinance was vague, in that the definition of "targeted" was circular and confusing; and 3) the ordinance was content-based in that the "targeting" of a residence would be determined by the content of the speech.

On October 15, 1993, the trial court overruled the demurrer; thereafter, petitioners sought a writ of prohibition in the Superior Court. The Superior Court, Judge Manoukian presiding, issued

the writ of prohibition on August 4, 1994. Judge Manoukian ruled that, though the ordinance was content-neutral and not vague, it was nonetheless overbroad.

The City sought review in the California Court of Appeal, Sixth Appellate District, by writ of mandate or prohibition. The court granted review because of the public importance of the issues raised by the case.

On February 15, 1995, the Court of Appeal issued a writ of mandate ordering the superior court to vacate its order and to issue a new order denying Real Parties' in Interest petition for writ of prohibition. The court held that the ordinance was a constitutional time, place, and manner restriction, which was narrowly tailored to serve the governmental interest in protecting residential privacy. The court did not address petitioners' argument that the ordinance was vague, and disposed of the issue of content-neutrality in a single sentence.[1]

Petitioners filed a motion for rehearing on March 2, 1995. The motion was denied on March 17. Petitioners then sought timely review by the California Supreme Court. The petition for review was denied on May 25, 1995 and the Court allowed the decision to remain published.

REASONS FOR GRANTING THE WRIT

In February, 1993, the City of San Jose passed an ordinance prohibiting "targeted" picketing within 300 feet of a "targeted" residence. San Jose Municipal Code § 10.09.010. This ordinance, though unique to California at the time of its passage, was quickly copied by other municipalities in California.[2] Several other cities

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[1] "[T]he ordinance before us is content-neutral since it applies to all picketers and not just to those who oppose abortion." App. 4a.

[2] See, e.g. Santa Clara County Ordinance Code § B13-22; Saratoga Municipal Code § 6-15.150. See also, Los Angeles Municipal Code § 56.45(e) (100 foot zone).

have enacted restrictions on residential picketing which track the language of the ordinance upheld in *Frisby v. Schultz*, 487 U.S. 474 (1988).[3] Still others have enacted *Frisby*-type ordinances which include an element of "targeting" or "focusing" on a residence.[4] A bill to restrict residential picketing throughout California was introduced last year in the state Legislature, was passed in the Senate, but died in the Assembly. It has been reintroduced this session.[5] At this time, the three largest cities in California have enacted ordinances restricting residential picketing.[6]

Similarly, across the country, numerous cities, counties, and states are passing or considering passing laws restricting residential picketing. These laws run the gamut from simply tracking the language of *Frisby v. Schultz*,[7] to creating convoluted systems whereby "restricted picketing" zones of any size may be established at any location in residential neighborhoods, at the will of a governing body.[8]

This Court has already addressed the issue of the permissible scope of ordinances restricting residential picketing. *Frisby v. Schultz*, 487 U.S. 474 (1988). The Court has also made clear, in other contexts, the constitutionally protected status of peaceful picketing or marching in residential neighborhoods. *Gregory v.*

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[3] See, e.g., Palos Verdes Estates Municipal Code § 9.05; Los Angeles County Code § 13.43.010; Pleasanton Municipal Code § 10.02.010. See also, Los Gatos Town Code § 18.50.100.

[4] See, e.g., Tustin Municipal Code § 6520; Davis Municipal Code § 24-51; Huntington Beach Municipal Code § 9.20.030; Santa Ana Municipal Code § 10.110; San Diego Municipal Code § 52.001 et seq.

[5] S.B. 85.

[6] Los Angeles Municipal Code § 56.45(e); San Jose Municipal Code section 10.09.010; San Diego Municipal Code § 52.001 et seq.

[7] Upper Arlington Municipal Code § 517.7; see, *Vittitow v. City of Upper Arlington* 43 F.3d 1100 (6th Cir. 1995), cert. denied, 63 U.S.L.W. 3860 (U.S. June 5, 1995)(94-1675).

[8] Fargo Municipal Code art. 10-0804 (1985); see, *Kirkeby v. Furness*, 52 F.3d 772 (8th Cir. 1995).

Chicago, 394 U.S. 111 (1969); *Madsen v. Women's Health Center*, 512 U.S. ____, 114 S.Ct. 2516 (1994).

Despite these decisions and the nearly unanimous weight of lower court authority, the Court of Appeal held that § 10.09.010 is a constitutional restriction on residential picketing. The court ruled that, rather than being inconsistent with Supreme Court precedent, § 10.09.010 is a "less onerous" and "far preferable" restriction on speech than the ordinance upheld in *Frisby*, which banned only focused picketing taking place solely in front of a particular residence. App. 6a. In support of its holding, the court cited a melange of ordinances, zoning regulations, and cases, only one of which had anything to do with residential picketing.[9] App. 7a–9a.

This Court should grant this writ to resolve for lower courts and particularly for local legislatures the permissible scope of restrictions on residential picketing consistent with First Amendment rights of free speech.

I. THE DECISION OF THE LOWER COURT CONFLICTS WITH OTHER STATE AND FEDERAL COURT DECISIONS.

The decision below conflicts with decisions of the Courts of Appeal for the Sixth and Eighth Circuits, the Ohio Court of Appeals, and the Supreme Court of New Jersey.

In *Vittitow v. City of Upper Arlington* 43 F.3d 1100 (6th Cir. 1995), *cert. denied*, 63 U.S.L.W. 3860 (U.S. June 5, 1995) (94-1675), the Sixth Circuit considered a *Frisby*-type ordinance banning picketing before or about any residence. The district court had issued an order limiting its enforcement to a targeted dwelling and the house on either side of that dwelling. The Sixth Circuit overturned the injunction, stating,

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[9] *Kaplan v. Prolife Action League* (N.C.App. 1993) 431 S.E.2d 828, *cert. denied*, 114 S.Ct. 2783 (1994) (upholding injunctive restriction on picketing within 300 feet of street on which plaintiff lived).

> . . .[T]he City's police view the ordinance as violated when they can discern one residence as being the target of picketing. In our view, that is a misreading of *Frisby*. All picketing of this nature will have a target, otherwise it is not really picketing. *Frisby* could not be more clear. '[O]nly focused picketing *taking place solely in front of a particular residence* is prohibited.' [citing *Frisby*].

43 F.3d at 1106–1107 (emphasis added by Sixth Circuit).

In *Kirkeby v. Furness*, 52 F.3d 772 (8th Cir. 1995), the Eighth Circuit reversed the district court's denial of a preliminary injunction prohibiting enforcement of a municipal ordinance banning "targeted residential picketing." The definition of targeted residential picketing included various forms of speech activity within 200 feet of the dwelling of an identified occupant. In holding that the injunction should issue, the court expressed "grave doubts that the ordinance in question can pass constitutional muster." 52 F.3d at 774. "In particular," the court found, "the ordinance's 200-foot zone is almost certainly too restrictive of the right to speak freely in public." *Id.* Citing to *Frisby*, *Madsen*, and *Vittitow*, the court held that "a 200-foot area may well be an impermissibly restrictive regulation of picketing as defined in the ordinance." *Id.* at 775.[10]

In *Ramsey v. Edgepark, Inc.* 66 Ohio App.3d 99, 583 N.E.2d 443 (1990), *review dismissed*, 53 Ohio St.3d 712, 560 N.E.2d 780, the court overturned an injunctive restriction on picketing within 200 yards of the appellees' home. The court stated that, based on its reading of *Frisby*,

> "a court may enjoin focused picketing taking place solely in front of a particular residence . . .[A]ny impingement beyond this narrow regulation of time, place, and manner would be

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[10] The Fargo ordinance also authorized the Board of City Commissioners to establish "restricted picketing zones" of any size, in which all picketing is prohibited for at least a year. The Eighth Circuit held that this provision was "of even more dubious constitutional validity" than the "targeted residential picketing" provision. *Id.* at 775.

> an infringement upon the First Amendment rights of those attempting to use public streets to communicate their message to the community. . . Appellants have a right to picket in the neighborhood, block or street where appellees live. There is no invasion of appellee's privacy as long as the picketers remain on public property and do not focus their activities solely at a particular home." 583 N.E.2d at 451-2.

These decisions present a clear conflict with the lower court's interpretation of *Frisby*. However, the court ignored both the *Vittitow* and *Ramsey* cases,[11] while citing a North Carolina appellate court decision, *Kaplan v. Prolife Action League*, 431 S.E.2d 828 (N.C.App. 1993), *cert. denied*, 114 S.Ct. 2783 (1994), which upheld a 300-foot injunctive restriction on residential picketing.

In *Murray v. Lawson* 138 N.J. 206, 649 A.2d 1253 (N.J. 1994), *cert. denied*, 63 U.S.L.W. 3845 (U.S. May 30, 1995) (94-1450), the New Jersey Supreme Court reconsidered in light of *Madsen* a 300-foot injunctive ban on residential picketing in a neighborhood where the lot frontages were about 60-70 feet wide. The Court narrowed the scope of the injunction, holding that "keeping defendants at such a great distance, thereby rendering plaintiffs' awareness of the picketing most unlikely as a practical matter, is unnecessary to protect plaintiffs' residential-privacy interests." *Id.* at 232-33, 649 A.2d at 1267.

The New Jersey court's holding in *Murray v. Lawson* highlights exactly the factor overlooked by the lower court in upholding § 10.09.010. The 300-foot zone imposed by the ordinance, in many if not all cases, will effectively keep picketers at such a great distance that the object of the picket will be unaware that any picket is going on. This complete insulation from the picketers' speech goes far beyond the interest in protecting residential privacy cited by this Court in upholding the ordinance in *Frisby*.

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[11] *Vittitow* was decided shortly after the appeals court handed down its decision, but was brought to the court's attention in the petition for rehearing. *Kirkeby v. Furness* had not yet been decided.

II. THE DECISION OF THE LOWER COURT CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. Residential Speech Activity: *Frisby v. Schultz*; *Madsen v. Women's Health Center*; *Gregory v. Chicago*; *Organization for a Better Austin v. Keefe*

In *Frisby v. Schultz*, 487 U.S. 474, (1988), this Court considered a residential picketing ordinance that prohibited picketing "before or about the residence or dwelling" of any person living in the town. Based on the representations of counsel for the town, the court concluded that the ordinance banned "*only focused picketing taking place solely in front of a particular residence. . . .*" 487 U.S. at 483 (emphasis added).[12] The ordinance did not prohibit "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Id.*

This Court further noted that, given that narrow construction, ample alternative channels of communication remained open: "'Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner. . . .'" *Id.* at 484 (quoting brief for appellant town).

Based on these considerations, and "*largely because of its narrow scope*," this Court ruled that the ordinance was not unconstitutional on its face. 487 U.S. at 488 (emphasis added). The ordinance was narrowly tailored to address the evil of focused picketing which renders the object of the picket a "captive audience" who is "trapped within the home." *Id.* at 487.

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[12] Unlike section 10.09.010, this Court evidently used the words "focused" and "targeted" to refer to a geographical element, not the intent of the picketers or the information they conveyed. See Section III, *infra*.

San Jose Municipal Code Section 10.09.010 provides that "No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling." Section 10.09.010(A). "Targeted" picketing is defined as "picketing activity that is targeted at a residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling." Section 10.09.010(C). This ordinance is not narrowly tailored to serve the governmental interest in preserving the right to privacy in the home. It does more than simply "target[] and eliminate[] . . . the exact source of the 'evil' it seeks to remedy," that evil being " 'the very presence of an unwelcome visitor *at the home*.' " *Frisby*, 487 U.S. at 485, 487, (quoting *Carey v. Brown*, 447 U.S. 455, 478 (dissenting) (emphasis added)). Rather, its broad sweep is designed to dilute the impact of the picket itself, by making it unlikely that the object of the picket will even know he or she is being picketed, unless he or she happens to come out of the house and look down the street, and possibly around a corner.

This Court said that there is a governmental interest in persons not feeling captive in their homes; it did not say that there is a right not to have one's conscience pricked in one's home. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (overturning injunction banning defendants from distributing leaflets door-to-door in plaintiff's neighborhood: "the claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper").

Moreover, the San Jose ordinance is not simply a regulation, but a complete ban on a certain form of expressive activity. Such complete bans, this Court in *Frisby* noted, are narrowly tailored "only if each activity within the proscription's scope is an appropriately

targeted evil." *Id.* at 485. Thus, § 10.09.010 is a valid restriction only if *any* picketing within three hundred feet of a residence is an "evil."

It defies practical experience to claim that a handful of people circling one or two hundred feet away, or walking by a residence once, or even two or three times an hour, are such an inherent evil and offensive intrusion as to warrant a complete ban.

In *Gregory v. Chicago* 394 U.S. 111 (1969) this Court overturned the disorderly conduct convictions of several demonstrators who had marched through a residential neighborhood, singing and chanting, and circled the block on which mayor's house was located several times. The Court held, "Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Unfortunately, this same conduct would fall well within the sphere of activity prohibited by section 10.09.010.

In *Madsen v. Women's Health Center* 512 U.S. ____, 114 S.Ct. 2516 (1994), this Court ruled specifically on a 300-foot "speech-free zone" around residences, imposed as a form of injunctive relief. Noting that the zone was "much larger" than the zone approved in its prior holding in *Frisby*, *supra*, this Court ruled that the record before the court "does not contain sufficient justification for this broad a ban on picketing."

The lower court disposed of *Gregory* by ignoring the majority opinion and relying instead on the concurring opinion of Justice Black. The court dismissed the holding in *Madsen* because this Court had outlined a "somewhat more stringent" standard of review in assessing the validity of injunctive restrictions on speech. The lower court failed to note that this Court repeatedly cited *Frisby*, and described the zone at issue as "much larger" and "this broad a ban," certainly implying that the zone would not survive even under the "somewhat" less stringent standard applied to ordinances.

Finally, rather than looking to the clear language of *Frisby*, the lower court here upheld the ordinance as a "far preferable" bright line standard than that provided in the more general restriction construed in *Frisby*. App. 6a. The lower court failed to recognize that, in order to serve the interest in protecting residential privacy, ordinances restricting residential picketing require flexibility, not rigidity. Only by creating an overly broad, one-size-fits-all zone, as § 10.09.010 does, can a "bright-line" ordinance cover all the variables arising in the context of residential picketing. Such an ordinance is clearly not narrowly tailored to serve the governmental interest in preventing individuals from feeling like captives in their homes.

B. Vagueness: *Connally v. General Construction Co.*

Section 10.09.010(A) provides that "No person shall engage in picketing activity that is targeted at *and* is within three hundred (300) feet of a residential dwelling." (Emphasis added). This section implies that picketing can be "targeted" at a residence but take place more than three hundred feet away. Evidently, "targeted" here does not refer to a geographical proximity; it would be impossible to geographically "target" a residence from more than 300 feet away. Thus, "targeted" in subsection (A) could mean "targeted" by the intent of the picketer with regard to one dwelling, or "targeted" by the information conveyed to the public.

In § 10.09.010(C), "targeted" picketing is defined as "picketing activity that is targeted at a residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling."

Here, "targeted" is defined, in part redundantly, and in part by a geographical component. To be "targeted," a picket must proceed on a course or route in front of or around a dwelling. The question naturally arises as to how one could proceed on a

route in front of or around a dwelling while remaining more than three hundred feet away from such dwelling. The 300-foot limitation in subsection (A) is most unclear if "targeted" picketing, by its definition, is picketing which takes place much closer to the dwelling than 300 feet. Similarly, it seems logically inconsistent for the ordinance to suggest that one could conceivably proceed on a course "in front of or around" a dwelling while remaining 300 feet away. Finally if the 300-foot zone merely defines what it means to be "around" a residence, then the definition in subsection (C) becomes completely redundant of subsection (A). In any case, the definition of "targeted" picketing fails to shed any light on the meaning of the term.

The wording of section 10.09.010 is vague and confusing. It is unclear what "targeted" means. A law which forbids an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Compounding the confusion, the City has stated that its "steadfast" position has been that "the definition of 'targeting' does not contain a geographic element." City's Reply Brief in Support of Petition for Writ of Mandate, pp. 14–15 and note 12. The City emphatically declares that "an individual living in one residential neighborhood can be the 'target' of picketing occurring in another neighborhood." *Id.* This, of course, contradicts the language of § 10.09.010(C) which states that "the term 'targeted' picketing means picketing activity that is targeted at a residential dwelling and *proceeds on a definite course or route in front of or around that particular residential dwelling*." (Emphasis added.)

Petitioners argued to the appellate court that § 10.09.010 is vague in its definition of "targeted." However, in its *de novo* review of the ordinance, the court never addressed this argument.

C. Content-neutrality: *Perry Ed. Ass'n v. Perry Local Ed. Ass'n.*

Throughout the course of this litigation, the City has made representations to the lower courts concerning how the City interprets the word "targeted" and how it intends to enforce the ordinance. See App. 31a. These statements demonstrate that the City sees the content of the speech communicated in a picket to be determinative of whether such a picket violates the ordinance. Such a content-based restriction can be justified only by compelling governmental interest. *Perry Ed. Ass'n v. Perry Local Ed. Ass'n.*, 460 U.S. 37, 45 (1983). The City has offered no such compelling interest.

The superior court did not reach this issue of content-neutrality, though it agreed that there was reason for concern, based on the City's representations, that the ordinance would be enforced in a content-discriminatory fashion. App. 31a.

Petitioners argued to the appellate court that this issue should be addressed, as the statements of the City Attorney regarding enforcement are relevant in a facial challenge. *Frisby*, *supra*, 487 U.S. at 474. However, the appellate court summarily pronounced the ordinance content-neutral, without any discussion of the City's statements.

CONCLUSION

In approving the imposition of a complete ban on picketing over an area which effectively insulates the object of the picket from being aware of the picketers' speech, the court ignored the rationale underlying *Frisby*, i.e., protection of residents from being "trapped within the home" by "an unwelcome visitor at the home." 487 U.S. at 487.

Unfortunately, the temptation of a "bright line" of enforcement has lured and continues to lure courts and legislatures, to the detriment of the First Amendment. This Court should grant this petition for review to settle the conflict over what is becoming one of the nation's fastest growing restrictions on peaceful First Amendment activity.

Respectfully submitted,

MICHAEL MILLEN
(Counsel of Record)

12 South First Street,
Suite 810
San Jose, CA 95113
(408) 998-3262

Attorney for Petitioners

August 23, 1995

APPENDICES

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

THE CITY OF SAN JOSE,

Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

TERRY L. THOMPSON, et al.,

Real parties in interest.

H013078
(Santa Clara County Super.Ct.No. 736204)
[Filed February 15, 1995]

The Respondent Superior Court has declared unconstitutional, under the First Amendment, a San Jose City Ordinance which outlaws targeted picketing within 300 feet of a targeted residence. The City of San Jose seeks expedited review of this decision by writ of mandate. Although the ordinance does not apply specifically to anti-abortion protesters, the present controversy arose when real parties in interest were charged with anti-abortion picketing within the proscribed distance of the homes of staff members of a clinic where abortions are performed.

Procedural History of the Case

The City of San Jose (City), petitioner, charged defendants, the real parties in interest, in the municipal court, with misdemeanor violations of an ordinance of the City of San Jose, Municipal Code Section 10.09.010, which prohibits any person from engaging in picketing activity that is "targeted at and is within three hundred (300) feet of a residential dwelling."

Defendants demurred on the ground the ordinance is unconstitutional. After the municipal court overruled the demurrers, defendants petitioned the superior court for extraordinary review. The superior court issued a writ of mandate directing the municipal court to sustain defendants' demurrers.

The superior court determined that the ordinance was content-neutral and not vague, and that it left "open, ample, and alternative channels of communication." However, in the same statement of decision the court found that under compulsion of the decision of the United States Supreme Court in *Madsen* v. *Women's Health Center, Inc.* (1994) ____U.S. ____ [114 S.Ct. 2516], the 300-foot buffer zone mandated by the ordinance was unconstitutionally broad.

City seeks review in this Court by writ of mandate or prohibition, asserting that it has no other effective remedy since it wishes to immediately enforce its ordinance.

City has no routine appellate remedy in this Court. Normally it would have an appeal to the superior court from a municipal court order dismissing or terminating an action before jeopardy, or giving judgment for the defendant upon the sustaining of a demurrer. (Pen. Code, § 1466, subds. (a)(1)(B), (C).) However here the superior court has already declared that such a demurrer must be sustained, has indeed mandated that result by writ. Therefore there is no further appellate remedy.

Routine appeals to this Court are not generally available in misdemeanor prosecutions. However, this case implicates the validity

of a public law. Also, current debate regarding what restrictions may appropriately be imposed upon residential protesters and picketers has generated much controversy and many legal challenges. We believe this case is a matter of sufficient public importance to be entitled to review in this Court, which can only be accomplished by writ.

Discussion

We hold that *Madsen* which involved application of First Amendment principles to an *injunction*, does not control this case, which involves application of First Amendment principles to a *public law*.

In *Madsen*, a Florida state court permanently enjoined anti-abortion protesters from blocking or interfering with public access to an abortion clinic, and from physically abusing persons entering or leaving the clinic. Despite the injunction, however, the protesters continued to impede access to the clinic. As a consequence, the clinic operators sought and obtained an expanded injunction which, inter alia, excluded demonstrators from a 36 foot buffer zone around the clinic entrances, restricted excessive noise-making within earshot of the clinic, prohibited protesters from approaching patients unwilling to talk within 300 feet of the clinic, and created a 300 foot buffer zone around the residences of clinic staff.

The Court found that the 36 foot buffer zone around the clinic entrance and the noise restrictions were valid. On the other hand, it held that the 300 foot no approach zone around the clinic was more burdensome than necessary to accomplish the government goal of preventing intimidation and ensuring access to the clinic. Likewise, it found that the 300 foot buffer zone around the residences of clinic staff was too broad. The Court noted that on the record before it, it appeared "that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." (114 S.Ct. at p. 2530.)

The Court emphasized, however, that "[i]f this were a content-neutral, generally applicable statute, instead of an injunctive order," a different and less "stringent application of general First Amendment principles" would apply. (114 S.Ct. at p. 2524.) "Ordinances," the Court explained, "represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. . . . [¶] Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis [such as is used in the case of an ordinance] is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at pp. 2524–2525.) Applying this "more stringent" (*id.* at p. 2524) standard, the Court found that the 300 foot buffer zone around the staff residences swept more broadly than was necessary to protect the tranquillity and privacy of the home.

According to *Madsen*, the standard to assess the constitutionality of a content-neutral ordinance is that set forth in *Ward* v. *Rock Against Racism* (1989) 491 U.S. 781 and similar cases, namely, whether the time, place, and manner regulations are " 'narrowly tailored to serve a significant governmental interest.' " (114 S.Ct. at p. 2524, quoting from *Ward* v. *Rock Against Racism*, *supra*, 491 U.S. at p. 791.)

As the trial court correctly found, the ordinance before us is content neutral since it applies to all picketers and not just to those who oppose abortion. (See e.g., *Va. Pharmacy Bd.* v. *Va. Consumer Council* (1976) 425 U.S. 748, 771; *Kaplan* v. *Prolife Action League* (N.C.App. 1993) 431 S.E.2d 828, 843; *Dayton Women's Health Ctr.* v. *Enix* (Ohio App.2 Dist. 1991) 589 N.E.2d 121, 127.)

The trial court also found that the ordinance leaves open alternative channels of communication. This finding is likewise correct. The issue arose on a demurrer, which raises no factual issues, only issues of law such as facial invalidity of the ordinance. Real parties

did not demonstrate that as a matter of law they had no alternative channels of communication. They made no undisputed showing that targeted picketing is the only way for real parties to communicate their message of anti-abortion sentiments to a general public.

Accordingly the ordinance, being both content-neutral and not a complete ban on real parties' rights of expression, is plainly valid unless it does not constitute a reasonable time, place and manner regulation as defined by the foregoing cases.

The seminal case regarding targeted residential picketing is *Frisby* v. *Schultz* (1988) 487 U.S. 474. That case, like this one, involved an ordinance. The ordinance, for the declared purpose of protecting residential privacy, made it unlawful for persons to engage in picketing before or about the residence or dwelling of any individual. (*Id.* at p. 477.) The court construed the ordinance as applying only to "targeted" picketing, that is, picketing specifically directed at the occupants of the picketed homes, and found it constitutionally valid as such. (*Id.* at p. 483.)

Since the ordinance in *Frisby*, as here, was content-neutral but applied in a public forum, the court applied the standard of constitutionality stated above, whether the ordinance was narrowly tailored to serve a significant governmental interest and whether it left open ample alternative channels of communication. (*Id.* at p. 482.)

The court found the ordinance was intended to protect an important privacy interest, that of residential privacy, which includes protection of the unwilling listener in his home. (487 U.S. at p. 484.) "There simply is no right to force speech into the home of an unwilling listener." (*Id.* at p. 485.) Pointing out the especially offensive nature of targeted picketing, the court said that such picketing "is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. . . . Here in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the . . . ordinance generally do not seek to disseminate

a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt. . . ." (*Id.* at p. 486.)

Other decisions have upheld zoning laws aimed at preserving the values of seclusion and quiet repose in a residential setting. (E.g., *Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1, 9.)

In short, the United States Supreme Court has described targeted picketing as highly offensive conduct which is not entitled to the same level of First Amendment protection as is more general expression of political or social views.

The ordinance here is limited to targeted picketing within 300 feet of the targeted residence, and narrowly defines targeted picketing as picketing that is focused on the home and "proceeds on a definite course or route in front of or around that particular residential dwelling." (Section 10.09.010, subd. (C).) This is the very activity that the *Frisby* court found "especially offensive" and inimical to residential privacy. (*Frisby* v. *Schultz*, *supra*, 487 U.S. at p. 486.)

The only difference between *Frisby* and our case is that here the ordinance sets a 300 foot buffer zone whereas in *Frisby* the ban applied to picketing " 'before or about' " a residence or dwelling. (487 U.S. at p. 477.) Given the necessary vagueness of the concept "before or about," we believe that the more precise 300 foot zone is less onerous. It leaves no doubt how to obey the law. Application of a bright line standard in this area is far preferable to a more general restriction. Picketers who respect the statutory boundary are protected, and there is less chance of discriminatory or uneven enforcement by the police.

In order to pass constitutional muster, an ordinance impacting First Amendment rights must be "narrowly tailored" to achieve a specific end. *Ward* v. *Rock Against Racism*, *supra*, 491 U.S. 781, held that a narrowly tailored regulation or injunction is not necessarily the least restrictive means of achieving the end, but rather, one which achieves a substantial governmental interest that could not be achieved as effectively without the regulation or injunction. (*Id.* at p. 799.)

Although *Madsen* has probably overruled this test as to injunctions, it remains the test applicable to ordinances. (*Madsen* v. *Women's Health Center, Inc.*, *supra*, 114 S.Ct. 2516; *Frisby* v. *Schultz*, *supra*, 487 U.S. 474.)

A variety of cases have permitted "clear zones" in various demonstration contexts. These include an ordinance banning targeted congregating within 500 feet of a foreign embassy (*Boos* v. *Barry* (1988) 485 U.S. 312); a ban on picketing near a courthouse (*Cox* v. *Louisiana* (1965) 379 U.S. 559); and many cases involving anti-abortion protests. (E.g., *Northeast Women's Center, Inc.* v. *McMonagle* (3rd Cir. 1991) 939 F.2d 57, 63–64 [upholding injunction prohibiting all but 6 pickets within 500 feet of clinic]; *Kaplan* v. *Prolife Action League*, *supra*, 431 S.E.2d at pp. 844–847 [300 foot restriction against residential anti-abortion protesters].)

The ordinance here is a legislative choice opting to protect residential privacy within a 300 foot zone of the targeted home, at the expense of targeted picketing. As we noted above, targeted picketing is a disfavored activity not entitled to a high level of First Amendment protection. Further, the ordinance leaves ample room for dissemination of anti-abortion ideas in a general way through marches, demonstrations and placards employed in residential neighborhoods and other places, provided individuals are not targeted within 300 feet of their homes. This zone compares quite favorably with the 500 foot zone in *McMonagle* or the 500 foot zone in *Boos* v. *Barry* protecting not residential privacy but the privacy of foreign diplomatic personnel in their embassy. (Note,

too, that the ordinance in *Boos* v. *Barry* was content-based, unlike here. See *Boos* v. *Barry*, *supra*, 485 U.S. at p. 321.)

Where ordinances are concerned, it is not the business of the court to write the statute. Review of legislative acts does not encompass quibbling over "a few feet." (See *Portland Fem. Women's H. Ctr.* v. *Advocates for Life* (9th Cir. 1988) 859 F.2d 681, 686.) A regulation of time, place and manner is not invalid " 'simply because there is some imaginable alternative that might be less burdensome on speech.' [Citation.]" (*Ward* v. *Rock Against Racism*, *supra*, 491 U.S. at p. 797.) The test, again, is whether the regulation promotes a substantial governmental interest that would be achieved less effectively absent the restriction. (*Id.* at pp. 798–799.) "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Id.* at p. 800.) Another case, upholding a 100 foot boundary line around a polling place, has also stated that it is not the court's job to draw the line, and that it is not a question of constitutional dimension whether the boundary line of the buffer zone could be somewhat tighter. (*Burson* v. *Freeman* (1992) 504 U.S. ____, [112 S.Ct. 1846, 1857].)

City cites several examples of buffer zones of comparable size which have been legislated. These include a ban on picketing within 500 feet of a funeral home, church or temple where funeral services are being held (Mass. Gen. L. ch. 272, § 42A (1990)); a prohibition on picketing within 300 feet of an exit from any justice building or residence used by a judge, juror, or other participant in a legal proceeding (N.C. Gen. Stat. § 14–225.1 (1993)); a ban on labor picketing within 200 feet of a hiring area (Me. Rev. Stat. tit. 26, § 595 (1988)); ban on soliciting driver training within 200 feet of a DMV office (Veh. Code, § 11110); ban on soliciting traffic violator school instruction within 500 feet of any court (Veh. Code, § 11215); sentence enhancement for committing certain substance abuse offenses within 1,000 feet of a public school (Health & Saf.

Code, § 11353.6) ban on reselling tickets within 1000 feet of the place of entertainment (N.Y. Arts & Cult. Aff. § 25.11 (1994)).

These statutes show that a 300 foot buffer zone contained in the ordinance before us is not an unusual or remarkably large protective space.

City also cites examples of the common use of 300 foot buffer zones in stay away orders issued in harassment injunction lawsuits. (E.g., *Kobey* v. *Morton* (1991) 228 Cal.App.3d 1055; see also *Glenside West Corp.* v. *Exxon Co., U.S.A.* (D.N.J. 1991) 761 F.Supp. 1118.) The court in *Kobey* v. *Morton* viewed the 300 foot restriction there imposed as appropriate to preserve an individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution. (228 Cal.App.3d at p. 1059.) The ordinance here is equally appropriate to preserve those same rights.

Also, the 300 foot buffer zone is consistent with standard notice requirements set forth in local and state laws for land use decisions. For instance, both state and local law require that notice be given to all owners of real property within 300 feet of real property subject to a land use decision. (Gov. Code, §§ 53096, subd. (a), 65091, subd. (a)(3), 66474.64; San Jose Municipal Code, §§ 13.48.120, 17.24.070, 20.08.360, 20.40.130, 20.44.070, etc.) The purpose of the 300 foot notice requirement is to ensure that property owners directly impacted by the land use decision have notice of the impending decision and an opportunity to give input. (E.g., *Concerned Citizens of Murphys* v. *Jackson* (1977) 72 Cal.App.3d 1021, 1025–1026; see also *Sundance Saloon, Inc.* v. *City of San Diego* (1989) 213 Cal.App.3d 807 [upholding an ordinance permitting a cabaret to be open after 2:00 a.m. if it is 300 feet from any single or multi family residence].) Thus these ordinances and laws reflect a governmental choice of the 300 foot zone as that within which direct impact on the resident occurs. It is wholly reasonable to apply that same concept in the context of protection of residential privacy, by removing from that area of impact the targeted picketing which invades such privacy.

To succeed in their claim of facial invalidity, real parties here must show as a matter of law that the 300 foot zone is substantially broader than necessary to protect the right of residential privacy involved. There has been no such showing made. The trial court has made no such finding.

Although we do not believe that on demurrer City has any burden to show a reasonable factual basis for the ordinance, it has made such a showing. City points out that the minimum standard lot frontage in San Jose subdivisions is 55 feet. (San Jose Municipal Code, § 19.36.200.) Many lots have larger frontages. At most, therefore, the 300 foot buffer zone keeps pickets from coming within five and a half homes on either side of the targeted residence. City says the legislature has reasonably chosen this buffer zone to provide a minimum degree of protection to the residents of targeted homes. But the zone does not prevent picketers from disseminating their message to the general public or even to the residents of the targeted homes, from a lawful distance.

The *Madsen* court explained that ordinances are entitled to greater deference than injunctions because they "represent a legislative choice regarding the promotion of particular societal interests." (114 S.Ct. at p. 2524.) The societal interests promoted by the instant ordinance—residential privacy, and freedom from targeted harassment and intimidation—are evident. The trial judge struck down the ordinance only because he felt bound by *Madsen*. In that, he erred.

The trial judge believed that the language in *Madsen* permitting less rigorous scrutiny of ordinances than injunctions did not apply to the holding that the 300 foot buffer zone was too broad. He stated that strict scrutiny applies to the size of the boundary. However, we find no such language in *Madsen*. Nowhere does it say that 300 feet is always too much nor that the size of the boundary is subject to strict scrutiny. The decision carefully scrutinizes that with which it deals—an injunction—to make sure it is no broader than necessary. Then, the Court considers whether something less

than 300 feet would be adequate. But that is not the way to review an ordinance, and nothing in *Madsen* says that it is.

We know of no case which attempts to second guess a legislature by initiating a judicial inquiry whether the legislature could have picked a smaller boundary zone. There is no general rule that a legislature must act as restrictively as possible. As the United States Supreme Court has said, "The 'less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation.' [Citation.] Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.' [Citation.]" (*Ward* v. *Rock Against Racism*, *supra*, 491 U.S. at p. 797.)

A legislature must act reasonably, and its choices are traditionally entitled to judicial deference unless they run clearly afoul of a constitutional requirement. (E.g., *Lockport* v. *Citizens for Community Action* (1977) 430 U.S. 259, 269, 272; *N.O. Public Service* v. *New Orleans* (1930) 281 U.S. 682, 686; *Frisby* v. *Schultz*, *supra*, 487 U.S. at p. 483; *Broadrick* v. *Oklahoma* (1973) 413 U.S. 601, 613.) Thus in *Frisby*, the ordinance did not even say that it applied to targeted picketing but banned all residential picketing, yet the court construed it as applicable to targeted picketing in order to save its validity. And *Madsen*, as stated above, carefully points out that ordinances are to be construed and tested differently from injunctions. An injunction may be no broader than necessary, whereas an ordinance is valid if it reasonably supports the government purpose in such a way that anything less would do an inferior job.

City has stated many valid concerns which have prompted its enactment of this ordinance. In analyzing a substitute ordinance which City has enacted for the duration of our review, the City Attorney states that "Picketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy

for its occupants and instill identical feelings of captivity, fear and intimidation in the targeted residents as do picketers directly in front of the residence. If picketers are close to a residence, it becomes impossible for the residents to access or leave their homes without having to run a gauntlet and confront picketers. For this reason, as other courts have recognized, buffer zones are needed to prevent the siege upon the home and the offensive intrusions of residential privacy caused by targeted residential picketing activities." The preamble to the instant ordinance recites similar concerns; for example it recites that "picketing activity that is targeted at a particular residence or household whose occupants do not welcome such activity may harass and intimidate such occupants, is inherently and unreasonably offensive to and intrusive upon the right to privacy in the home and may cause the occupants of such home to experience great emotional distress." Further: "[S]uch unwelcome and targeted picketing activity creates a 'captive audience' situation because the occupants of a residence or household cannot readily move to another residence or household in order to avoid the unwelcome picketing activity being directed at them."

These recitals reflect the underlying legislative judgment that targeted residential picketing is a harmful phenomenon which needs to be limited. Defendants do not and cannot demonstrate that such conclusions are so unreasonable and arbitrary as to be beyond the power of the legislature. To the contrary, these recitals are consonant not only with the philosophy expressed in many of the United States Supreme Court decisions discussed herein, but also with common sense.

The greater deference applied to ordinances in the *Madsen* opinion is not arbitrary. The checks and balances built into our political system rely on separation of powers. (See generally, e.g., *Myers* v. *United States* (1926) 272 U.S. 52, 292–293 (dis. opn. of Brandeis, J.).) The judiciary does not have plenary powers of review over the legislature; it is not a judicial function to write statutes. (E.g., *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, 395; *Rittenband* v. *Cory* (1984) 159 Cal.App.3d 410, 417; *Associated*

Home Builders Etc., Inc. v. *City of Livermore* (1976) 18 Cal.3d 582, 604; *Lockard* v. *City of Los Angeles* (1949) 33 Cal.2d 453, 461; *Coffee-Rich, Inc.* v. *Fielder* (1972) 27 Cal.App.3d 792, 810.) But injunctions are crafted by trial courts, and it is the job of reviewing courts to review trial courts. Accordingly, a much broader review power may appropriately come into play when scrutinizing an injunction. When it comes to a personal injunction, which is probably the most onerous relief which a trial court can give, a reviewing court does have broad powers of review to ensure that the trial court has not overstepped the proper limits of equitable relief. (E.g. *Grey* v. *Webb* (1979) 97 Cal.App.3d 232, 236-237; *Western Electroplating Co.* v. *Henness* (1959) 172 Cal.App.2d 278, 283; *Schwartz* v. *Arata* (1920) 45 Cal.App. 596, 601.) But the reviewing court has no such power over a legislature. (Cf. *Marbury* v. *Madison* (1803) 5 U.S. (1 Cranch) 137.)

Accordingly, the distinction which *Madsen* so carefully draws between review of an injunction and review of an ordinance is not a trivial or gratuitous part of the opinion; it is an appropriate and statesmanlike expression of the difference between review within the judicial branch, and beyond it. To assume that this distinction applies only to some undefined part of the ordinance other than the choice of 300 feet is incorrect.

Real parties' reliance on *Gregory* v. *Chicago* (1969) 394 U.S. 111, is misplaced. That case found insufficient evidence to convict of charges of disturbing the peace based on an orderly civil rights march which the police disrupted. The concurring opinion (Black, J.) pointed out that residential picketing can indeed be controlled by the City, but that in *Gregory* it had not enacted any ordinances to do so but relied on the ad hoc conclusion by the police that the particular demonstration was unlawful. (See conc. opn. of Black, J., at p. 125.)

Further, on the subject of the government's right to limit targeted residential picketing, Justice Black should be quoted in full: "Were the authority of government so trifling as to permit anyone

with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. . . . But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." (*Gregory* v. *Chicago*, *supra*, 394 U.S. at pp. 125-126.)

Conclusion

Let a peremptory writ of mandate issue, commanding respondent court to vacate its order of September 14, 1994, and to issue a new order denying the petition for writ of prohibition requested by real parties.

/s/ Wunderlich, J.

WE CONCUR:

Cottle, P.J.

Premo, J.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

TERRY L. THOMPSON, et al.,

Petitioner,

vs.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent.

CITY ATTORNEY FOR THE CITY OF SAN JOSE,

Real Party In Interest.

ORDER GRANTING PETITION FOR WRIT OF MANDATE

No. CV 73 62 04
[C93 504599-50472, C93 54125]

[Filed August 4, 1994]
(Hon. Leon P. Fox)

SUMMARY OF STATEMENT OF DECISION

The Petition for a writ of mandate is GRANTED. The matter is remanded to the Municipal Court with an order that the Demurrers are to be SUSTAINED.

While the Municipal Court correctly found that the challenged ordinance was content neutral and was not vague, this Court, under compulsion of *Madsen v. Women's Health Center, Inc.*, (United States Supreme Court 93-880), filed June 30, 1994, finds that the 300-foot buffer zone mandated by the ordinance is unconstitutional.[1]

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioners Terry L. Thompson, Joseph Patrick Vessels, Christopher Brown, George Linburg Allen, Julius Bahl, Michael Christian Ross, Abner Warner, Colleen Marie White, Murphy Karczewski, Andrea Lynn Spakousky, Douglas K. Theobald, Timothy Dee Wilson, Charles Carlson, Mary Alida Mueller, Lynn Turner Weber and

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[1] "[A]bortion is not the central issue in this case. The free-speech problems presented could arise in any context. At issue is the extent to which the First Amendment's protection of political expression is limited by the rights of private citizens to conduct their lawful business without pain or hindrance. [¶]In our society, all presumptions are in favor of unfettered expression, particularly where the forum is public and an issue of broad concern is involved. The First Amendment protects vigorous, even stinging, debate. The burden generally falls on the recipients of an unwanted message to turn away. [citations omitted.] [¶]The question remains, however, whether the same protection applies where the speaker seeks to engage in face-to-face confrontations with individual members of a targeted audience, and where the risk of intimidation, humiliation, or violence is high. What if such tactics are calculated to coerce unwilling targets into a particular course of conduct whether or not they are persuaded by the message the speaker seeks to convey? These issues assume special significance in a media-savvy age, where news coverage may serve as an additional incentive for staging a violent protest. [¶]Such tactics do not necessarily fall within the aegis of the First Amendment. . ." *Planned Parenthood Shasta-Diablo v. Williams* (1994) 7 Cal.4th 860, 882 (Concurring opinion of Baxter, J.)

D.J. Bahl petition this court for a writ of prohibition directed to the Santa Clara County Municipal Court.

Petitioners were charged in July and August of 1993 with violations of San Jose Municipal Code Section 10.090.010, "Targeted residential Picketing Prohibited".

The interests served by San Jose's Targeted Residential Picketing ordinance are clearly recited in the preamble to the ordinance itself. This preamble provides as follows:

> Whereas, the preservation and protection of the right to privacy in the home and the enjoyment of tranquility, well-being and sense of security in the home are in the public interest and are uniquely and critically important to the public health, safety and welfare; and
>
> . . . . .
>
> Whereas, picketing activity that is targeted at a particular residence or household whose occupants do not welcome such activity may harass and intimidate such occupants, is inherently and unreasonably offensive to and intrusive upon the right to privacy in the home and may cause the occupants of such home to experience great emotional distress; and
>
> Whereas, such unwelcome and targeted picketing creates a "captive audience" situation because the occupants of a residence or household cannot readily move to another residence or household in order to avoid the unwelcome picketing activity being directed at them. . . . . .

(San Jose Municipal Code Section 10.09.010)

> 10.09.010 *Targeted Residential Picketing Prohibited.*
>
> A. No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling.

B. For purposes of this Chapter, the term "residential dwelling" means any permanent building being used by its occupants solely for nontransient residential uses.

C. For purposes of this Chapter, the term "targeted" picketing means picketing activity that is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling.

D. This chapter does not and shall not be interpreted to preclude picketing in a residential area that is not targeted at a particular residential dwelling.

At the hearing in front of the Respondent Court, the City Attorney informed the Court that violation of this section is a misdemeanor. (Transcript of Hearing of October 8, 1993, page 2). This point is not in dispute. Petitioners demurred to these charges on constitutional grounds. Oral argument on the demurrer was presented on October 8, 1993, before the Honorable Leon P. Fox, Judge of the Municipal Court. The demurrer was overruled on October 15, 1993.

Petitioners now seek a writ of prohibition directed to the Municipal Court restraining said court from conducting further proceedings on this case on the ground that San Jose Municipal Code Section 10.090.010 is unconstitutional.

An Alternative Writ of Prohibition was issued on December 8, 1993, by the Honorable James C. Chang of this Court, directing the Municipal Court and the San Jose City Attorney (Real Party in Interest) to show cause why it should not be forever restrained from taking any further proceedings or making any orders affecting petitioners in this action.

This Court heard this matter on May 10, 1994. At the hearing, this Court informed the parties that it was aware of a matter that was awaiting a decision in the United States Supreme Court entitled *Madsen v. Women's Health Center* concerning the legality of an injunction in a situation somewhat similar to the present case.

Both sides stipulated to this Court keeping the case under submission pending the *Madsen* decision. On June 30, 1994, Mr. Chief Justice Rehnquist delivered the opinion of the court in *Madsen*. This Court ordered further briefing.

San Jose's Targeted Residential Picketing ordinance is content neutral on its face. The ordinance prohibits "targeted residential picketing" within 300 feet of a residence regardless of the content of the speech.

Petitioners contend that certain comments by counsel for the City of San Jose at oral argument on the demurrer below demonstrate that enforcement of the San Jose ordinance will depend on the content of the speech. ("The City states they will exercise prosecutorial discretion and weigh whether the speech in question [s]ubject[s] to ridicule'." (Petitioners' Memorandum of Points and Authorities in Support of Writ of Prohibition at p. 3.)

However, Petitioners' claim in the instant petition is that the San Jose Targeted Residential Picketing ordinance is unconstitutional *on its face*, not as it could be applied in particular situations. (*Id.* at p. 2, line 9.) Therefore, the manner in which the City of San Jose might enforce this ordinance is not determinative of the issues presented in this petition.

II. QUESTIONS PRESENTED

A. Is San Jose Municipal Code section 10.090.010 overly broad in violation of the United States Constitution?

B. Is San Jose Municipal Code section 10.090.010 unconstitutionally vague?

III. ANALYSIS

A. RULES OF CONSTRUCTION

(1) The wording of a penal statute is construed according to the usual and ordinary meaning of the language employed.[2]

(2) A practical construction is preferred to one that is technical, and is required when a technical construction would lead to an absurd result.[3]

(3) When specific statutory language conflicts with general language, the specific provisions prevail as required by the rule of "*ejusdem generis*", when they do not conflict, the general rule is to supplement the specific.[4]

(4) As required by the rule of *expressio unius est exclusio alterius*, when exceptions to a general rule are specified by a statute, other exceptions are not to be implied or presumed.[5]

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[2] *See People v. Wyrick* (1978) 77 Cal.App.3d 903, 906-908 (usual and ordinary meaning of statute prohibiting electronic recording of confidential communication without consent of party to conversation plainly states proscribed conduct); *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 442-443 (usual and ordinary meaning of language in death penalty statute that a person found guilty of first-degree murder shall suffer death in any case in which special circumstances allegation is found to be true meant that court could not strike the special circumstances allegation pursuant to another section).

[3] *See In re Greer* (1980) 108 Cal.App.3d 1002, 1007-1009, fn.5 (technical construction of the word "court" would result in magistrate being unable to hear and decide demurrer even though a defendant has the right to demurrer as early as arraignment).

[4] *See People v. Fields* (1980) 102 Cal.App.[3d] 341, 344 (rule of ejusdem generis does not apply when statute contains words of clear meaning without need of interpretation).

[5] *See Santa Ana v. Garden Grove* (1979) 100 Cal.App.3d 521, 528 (words "but limited to" preceding list of various governmental actions are not to be given construction based on "expression unius est exclusio alterius" principle).

(5) A relative or qualifying term applies to the word, phrase, or clause immediately preceding it; and not to more remote phrases.[6]

(6) Punctuation, grammar, or spelling may be corrected by a court, if such correction will clarify a statute that is ambiguous, absurd, or inconsistent with the context as printed.[7]

(7) A statute is to be construed as a whole in reference to the entire scheme of law of which it is a part, including consideration of the chapter and section headings or descriptions.[8]

(8) When there is a conflict between provisions of the same statute, those susceptible to one meaning will control those susceptible to two meanings if the statute can be made harmonious by doing so.[9]

(9) When language that is reasonably susceptible to two constructions is used in criminal law, the construction that is more favorable to the defendant is adopted.[10]

(10) A statute should usually be construed so as to make it valid, and a construction favoring its constitutionality is preferred. *Frisby v. Schultz* (1988) 487 U.S. 474, 483.

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[6] *See People v. Mancha* (1974) 39 Cal.App.3d 703, 711-712.

[7] *See Rocca v. Boyle* (1913) 166 Cal. 94, 97-100 (court refused to supply commas to change meaning when statute was plain and consistent with related statutes).

[8] *See People v. Weltsch* (1978) 84 Cal.App.3d 959, 965 (court looked at Penal Code section placement in title entitled "Crimes Against the Person" and in chapter entitled "Other Injuries to Persons").

[9] *See People v. Maroney* (1944) 24 Cal.2d 638, 643-644 referring to two other conflicting statutes, one with only one meaning, other with two possible meanings, construed in favor of statute with only one meaning).

[10] *See Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 (murder statute was construed to exclude act of killing unborn fetus).

When a literal interpretation of a statute is not possible and the rules of construction provide little aid, judicial construction of the statute is still required and the court may look to legislative intent in order to do so. A statute must be construed so as to give effect to the intent of the legislative body. To ascertain legislative intent, the court should construe a statute with reference to the whole system of law, of which the statute is a part. Furthermore, the court may look to legislative history materials if available.[11]

B. SUMMARY OF IMPORTANT PICKETING CASES

1. Gregory v. Chicago

In *Gregory v. Chicago* (1969) 394 U.S. 111, the petitioners, Chicago protesters who marched peacefully through the mayor's neighborhood, had been convicted of disorderly conduct. The Supreme Court reversed the convictions in a one and one-half page, four paragraph opinion. The Court held that "Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." (*Gregory*, *supra*, 394 U.S. at 112.)

2. Robins v. Pruneyard Shopping Center

Although the case at bar pertains to private residential property, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, held that all private property is subject to the power of the government to regulate its use for the public welfare and property rights must yield to the public interest.

The shopping center had a policy not to permit any tenant or visitor to engage in publicly expressive behavior, including the circulation of petitions. Petitioners had set up a card table in the

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[11] "[S]ubstantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." *Rust v. Sullivan* (1991) 114 L.Ed.2d 233, 249.

corner of the courtyard to discuss concerns regarding a United Nations resolution and solicit signatures for a petition to be sent to the White House. The court stated

> We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. *Id.* at 906.

The California Constitution under Article I, section 3 declares that people have the right to petition the government for redress of grievances. This right is fundamental to the basic process of California government which allows direct initiation of change by the citizenry through initiative, referendum and recall. Article I, section 2 of the California constitution states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

The *Robins* court extended the assurances of protected speech to the privately owned sidewalk in front of a grocery store. A sidewalk is not private in the sense that the public may not use it. To the contrary, the public is openly allowed to use it to gain access to the store and in leaving the store or merely passing by. The court determined that the sidewalk is a public area in which members of the public may exercise First Amendment rights.

Interestingly, the court specified that "[b]y no means do we imply that those who wish to disseminate ideas have free rein." *Robins* at 910. Moreover, the court distinguished those cases involving a retail shopping center from those which involve the property or privacy rights of an individual homeowner. It is unclear how the *Robins* court would analyze the latter or what, if any difference the court would apply in analyzing such a case.

3. Frisby v. Schultz

In *Frisby v. Schultz* (1988) 487 U.S. 474, the United States Supreme Court upheld a Brookfield, Wisconsin ordinance that completely banned picketing "before or about" any residence. The Brookfield ordinance made it unlawful for "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield". (*Frisby*, *supra*, 487 U.S. at 477.)

In passing on the constitutionally of this ordinance, the Court first examined the place or "forum" the speakers sought to employ. (*Id.* at 479.) "[T]he standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue'." (*Id*, quoting *Perry Education Assn. v. Perry Local Educator's Assn.* (1983) 460 U.S. 37, 44.) The *Frisby* court found that public streets and sidewalks in residential neighborhoods constitute "traditional public fora" which "have immemorially been held in trust for the use of the public". (*Frisby*, *supra*, 487 U.S. at 481, citing *Hague v. CIO* (1939) 307 U.S. 496, 515.)

The *Frisby* court then reiterated the following test to be applied to laws restricting speech in traditional public fora:

> In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. (*Frisby*, *supra*, quoting *Perry*, *supra*, at 45.)

The *Frisby* court explained that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (*Frisby*,

supra, 487 U.S. at 484; quoting *Carey v. Brown* (1980) 447 U.S. 455, 471.) Prior decisions of the Supreme Court "have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value'." (*Id.*) In this regard, the Supreme Court has "often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick'." (*Frisby*, *supra*, at 484, quoting *Gregory v. Chicago* (1969) 394 U.S. 111, 125.) Finally, the Supreme Court recognized the importance of protecting "the unwilling listener" or "captive audience" who cannot avoid the objectionable speech. (*Frisby* at 484–487; *Consolidated Edison Co. v. Public Service Comm'n of New York* (1980) 447 U.S. 530, 542.)

Applying to the Brookfield ordinance the "well-established principle that statutes will be interpreted to avoid constitutional difficulties" (*Frisby* at 483), the *Frisby* court construed the Brookfield ban "to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited." (*Id.*) The *Frisby* court found that this narrow reading was supported by the representations of Brookfield's lawyer. These representations included the following definition of "picketing": "having the picket proceed on a definite course or route in front of a home." (*Id.*) The *Frisby* court also relied on the town counsel's representation that "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by the ordinance." (*Id.*) The *Frisby* court's narrow reading of the ordinance was further supported by the following definition of "picketing" found in Webster's Third New International Dictionary 1710 (1981): "posting at a particular place." (*Id.* at 482.) The Court found that this "characterization [was] in line with viewing the ordinance as limited to activity focused on a single residence." (*Frisby* at 482.)

4. Vittitow v. Upper Arlington

In *Vittitow v. Upper Arlington, Ohio* (S.D.Ohio 1993) 830 F.Supp.1077, anti-abortion protesters sought to enjoin a city ordinance which banned residential picketing. The ordinance provided that "[n]o person shall engage in picketing before or about the residence or dwelling of any individual in this City." (*Vittitow*, *supra*, at 1079) The plaintiffs, unlike the picketers in *Frisby*, had been engaged in a slowly moving picket line which was spread out up to 200 feet from a doctor's residence. (*Vittitow*, *supra*, 830 F.Supp. 1077, 1079–1081.) Therefore, the picket "was not, strictly speaking, '*solely* in front of a particular residence" (*Id.* at 1081, citing *Frisby*, *supra*, 487 U.S. at 483.)

In ruling on this request for an injunction, the *Vittitow* court first explained that "the continuous line of picketers marching slowly around the small cul-de-sac and in front of the doctor's home . . . is the functional equivalent of the type of siege" conducted in *Frisby*. (*Vittitow*, *supra* at 1081.) The *Vittitow* court then held that a city could not constitutionally prohibit picketers "from picketing in any particular residential neighborhood, street or cul-de-sac." (*Id.* at 1083.) However, the *Vittitow* court held that the city could properly prohibit the demonstrators from picketing in front of a doctor's home and two homes on either side of the doctor's home. (*Id.*) Similarly, the *Vittitow* court held that the city can lawfully prevent "picketing in front of: (a) the home of anyone [the city] [has] probable cause to believe is the target, focus or subject of the picketing, as well as (b) the two homes on either side of the home just described." (*Id.*) The court held that these "bright-line" rules created a constitutionally permissible "zone of residential privacy". (*Id.* at 1082.)

5. Ramsey v. Edgepark, Inc.

In *Ramsey v. Edgepark Inc.* (1990) 583 N.E.2d 443, the court reviewed the grant of an injunction against picketers who targeted

the plaintiff's homes. The court upheld the grant of this injunction "[b]ecause the Supreme Court has recognized targeted picketing as being inherently offensive." (*Ramsey*, *supra*, 583 N.E.2d at 442.) In affirming the injunction, the *Ramsey* court explained that

> the mere act of targeted picketing at a residence can be a highly offensive intrusion. . . A court-ordered limitation on the rights of picketers does not violate their First Amendment rights as long as. . . [it] is narrowly tailored to protect the privacy of the targeted individuals.

(*Ramsey* at 451.)

6. Planned Parenthood Shasta-Diablo, Inc. v. Williams

In *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860, the California Supreme court upheld an injunction that barred anti-abortion protesters from a public sidewalk in front of an abortion clinic by requiring that all picketing or demonstrating take place on the public sidewalk directly across the street from the clinic. It was undisputed that the sidewalk directly in front of the clinic constituted a public forum. The court therefore determined the standard of review and determined whether the injunction was content neutral, narrowly tailored to serve a significant governmental interest and permits ample alternative channels of communication.

The court determined that the injunction was content neutral because the injunction makes no reference to the petitioners' particular viewpoint or even to the general subject matter of their demonstrations. The injunction focused on when, where and how the petitioners' may speak, not "what" they may say. Also the state had a strong interest in protecting women seeking abortions from confrontational activities of the protesters. The injunction was narrowly tailored to advance the state's interest by establishing a

"clear zone" in which protesters were precluded from engaging in confrontational activities. Finally, the demonstrators had an adequate alternate means of communication since they could picket and demonstrate directly across the street from the clinic.

The United States Constitution does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. Even in a public forum, the government may impose reasonable restrictions on the time, place and manner of the protected speech.

7. Madsen v. Women's Health Center

On June 30, 1994, Chief Justice Rehnquist delivered the opinion of the court in *Madsen v. Women's Health Center* D.A.R., 7/1/94, p. 9274. The Petitioners challenged the constitutionality of an injunction issued by a Florida state court which prohibited, among other things, anti-abortion protestors at all times from approaching, congregating, picketing, patrolling, demonstrating, using bullhorns or other sound amplification devices within 300 feet of private residences belonging to the homes of doctors or other employees who worked in the health clinic. The petitioners were also enjoined from inhibiting or impeding the ingress and egress of any person to any street that provides the sole access to the street on which the residences were located. The plain language of the injunction encompassed and banned any and all types of demonstration and demonstration-like activity within a 300 ft. radius of a private residence.

The Supreme Court determined that the injunction, as it pertained to residential areas, was unconstitutional. The court was quick to point out that although they had previously upheld a law banning "targeted" residential picketing (*Id.* at 9280, citing *Frisby v. Schultz*, (1988) 487 US 474, 101 L.Ed.2d 420), the injunction in *Madsen* provided for a much larger zone of protection (300 ft.)

surrounding a home, than did the zone allowed in the *Frisby* opinion.

The distinguishing factor between *Frisby* and *Madsen* is the discrepancy in what is deemed to be an "approachable" distance from a residence. According to the injunction in *Madsen*, even general marching, congregating or walking a general route in front of an entire block of houses would be banned, so long as it occurs within 300 ft. of a house belonging to a clinic employee. However, the 300 ft. "no approach zone" surrounding a residence was held to be unconstitutional because the injunction swept more broadly than necessary in order to accomplish its goals. The court stated

> [t]he record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result. *Madsen*, 7/1/94 D.A.R at 9280.

It is unclear what the court would accept as a permissible "smaller zone" or if the injunction would have been constitutional but for the designation of the 300 ft. zone. Given the "smaller zone" language by Mr. Chief Justice Rehnquist, and in conjunction with the *Frisby* decision, it is reasonable to assume that the area solely in front of the "target residence" would still be an acceptable zone. Exactly how far outside of this area would still be considered within the acceptable "smaller zone" is unclear. Unquestionably, however, the distance of 300 feet, the zone at issue in this case, does not fall within the *Madsen* court's definition of a "smaller zone". Regardless of the "smaller zone" language in the opinion, it is apparent that the Supreme Court found that to ban people from approaching, congregating, picketing, patrolling, or demonstrating at any time within 300 feet of any clinic staff's home, was unconstitutional.

D. ANALYSIS OF THE FOREGOING AUTHORITIES *AS APPLIED TO THE FACT OF THIS CASE*

Petitioners contend that Section 10.090.010 of the San Jose Municipal Code is unconstitutional on its face. Petitioners assert that this ordinance is overly broad because it prohibits picketers from marching through a residential neighborhood, an activity which is protected by the First Amendment to the United States Constitution.[12]

In applying generally accepted constitutional principles to the case at bar, this Court must interpret the San Jose Targeted Residential Picketing ordinance so as to avoid constitutional difficulties. This Court should also give a narrow construction to this restriction on residential picketing.

Likewise, this court must apply these principles with great care because the San Jose ordinance clearly restricts speech in a public forum, to wit: sidewalks and streets in front of and around residential dwellings. It is therefore necessary to determine (1) whether the San Jose Ordinance is content neutral, (2) if so, whether the ordinance is narrowly tailored to serve a significant government interest, and (3) whether the ordinance leaves open ample alternative channels of communication.

C. THE LANGUAGE OF THE SAN JOSE ORDINANCE

1. THE LANGUAGE IS CONTENT NEUTRAL.

It is clear from the language of the ordinance that it does not govern the content of the picketing. The Municipal Court Judge so found. (Transcript of Hearing of October 15, 1993, page 3, line 16.) Substantial evidence exists to support this finding.

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[12] The City concedes that the ordinance does not prohibit residential picketing. (Transcript of Hearing of May 10, 1994, page 16, line 11.)

The constitutionality of a content-neutral, generally applicable statute is assessed under the standard set forth in *Ward v. Rock Against Racism* (1991) 491 U.S. 781, 791. *(Madsen, supra* at 9276.) The restrictions must be justified without reference to the content of the speech, are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. (*Id.*) "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (*Ward, supra* at 791.)

On the other hand, counsel for Petitioners points to several places in this record to suggest that the City of San Jose intends to control regulate [sic] of the picketing.

First, the City's Opposing Papers to the present Petition state that "[i]nherent in the term 'picketing' exists [sic] and oppositional element" (page 8, line 10).

Second, at the hearing before the Municipal Court on October 8, 1993, the City Attorney said that the ordinance was "an anti-harassment ordinance." (Transcript of Hearing of October 8, 1993, page 16, line 10.)

Third, at the hearing before the Municipal Court on October 8, 1993, the City Attorney said that the word "target" meant "subject to ridicule." (Transcript of Hearing of October 8, 1993, page 16, line 10.)[13]

Fourth, at the hearing before this Court, the City Attorney argued that proof of "targeting" could include evidence that the picketers were "yelling profanities at that location." (Transcript of Hearing of May 10, 1994, page 6, line 11.)

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[13] At the hearing before this Court on May 10, 1994, the City Attorney conceded that perhaps she needed to correct that statement. (Transcript of Hearing of May 10, page 9, line 21.)

These points are of concern to this Court. If the City uses the foregoing as evidence of targeting, the statute is subject to discriminatory enforcement.[14] However, the present proceedings do not reach this issue.

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[14] The fact that a statute is content neutral is not always dispositive since a statute that is content neutral can be enforced in a discriminatory manner. *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 30 L.Ed. 220 applied the principles of the equal protection clause to the discriminatory enforcement of a law by administrative and executive city officials. While the court declined to strike down the ordinance itself, they did find that the board had impermissibly discriminated against Chinese-Americans and that such administrative discrimination directly violated the equal protection clause. *Yick Wo* recognized that individuals suffer an equal denial of constitutional rights when executive officials apply a facially fair law, as though the statutory language had incorporated such a specific exclusion. In instances where facially neutral laws are questionably applied, substance must prevail over form. However, courts have consistently acknowledged that administrative officials, such as the police, are given broad discretion in determining those instances when punitive sanctions should be invoked.

California law is in line with federal cases. In *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, the court held that

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. *Id.* 296-297.

In *People v. Superior Court* (*Hartway*) (1977) 19 Cal.3d 338, the defendants, female prostitutes, alleged that the Penal Code section under which they were arrested and charged was unconstitutional on its face and as applied by the Oakland Police Department because males were not arrested. Like the ordinance in *Yick Wo, supra,* the statute challenged in *Hartway* was also fair on its face and impartial in appearance. The court found that the finding of fact was supported by substantial evidence and the court would not reweigh the evidence in order to come to a contrary conclusion.

2. THE LANGUAGE IS NOT UNCONSTITUTIONALLY VAGUE.

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague." (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.) An unduly vague law violates due process. (*Id.*)

"Vague laws offend several important values." (*Id*, quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108–109.) Because vague laws fail to provide fair warning of prohibited conduct, "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (*Id.*) In addition, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." (*Id.*)

Petitioners in the case at bar challenge the San Jose Targeted Residential Picketing ordinance on the ground that it is unconstitutionally vague. Petitioners assert that the term "targeted", in combination with the phrase "within 300 feet of a residential dwelling" is ambiguous and confusing.

A reading of San Jose's ordinance in light of the pertinent authorities demonstrates that it is sufficiently precise and well defined to withstand a vagueness challenge. The ordinance prohibits picketing that is "targeted" at a particular residential dwelling.

People of ordinary intelligence know that the term "target" means to aim, direct or focus at something. Webster's Dictionary also contains this common definition. (See Webster's definitions, *supra.*)

Furthermore, the Supreme Court in *Frisby* uses the term "target" to refer to lawfully prohibited residential picketing. (*Frisby*,

supra, at 487, "the 'evil' of targeted residential picketing, the very presence of an unwelcome visitor at the home . . . is created by the medium of expression itself.") The *Vittitow* and *Ramsey* courts also use the word "target" to describe picketing activity which is properly subject to time, place and manner restrictions. (See *Vittitow*, *supra* at 1083, *Ramsey*, *supra* at 442)

Finally, the express ban on picketing within "300 feet of a residential dwelling" in the San Jose ordinance is clear and precise. A person of ordinary intelligence is given fair warning that targeted residential picketing is banned within 300 feet of the residential dwelling. Likewise, those who are charged with enforcing this law are provided clear and explicit standards to apply. Law enforcement officers are specifically informed that a person has violated this ordinance only if they engaged in targeted residential picketing activity within 300 feet of the residential dwelling.

As noted by the *Frisby* court, the common definition of "picketing" found in Webster's Third New International Dictionary 1710 (1981) is "posting at a particular place." (*Frisby* at 482.) The San Jose ordinance defines "residential dwelling" as "any permanent building being used by its occupants solely for nontransient residential uses." (San Jose Municipal Code Section 10.09.101 subd. (B).) The San Jose ordinance defines "targeted" picketing as "picketing activity that is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling". (*Id*, subd. (C).) Webster's Unabridged Encyclopedic Dictionary of the English Language defines the verb "target" as "to use, set up, or designate as a target or goal . . . to make a target of (an object, person, city, etc.) for attack or bombardment." (Webster's Unabridged Encyclopedic Dictionary of the English Language, Portland House, New York, New York, 1989.)

3. ALTHOUGH THE TARGETED RESIDENTIAL PICKETING ORDINANCE SERVES A SIGNIFICANT GOVERNMENT INTEREST, IT IS NOT NARROWLY TAILORED. THEREFORE, *THE 300 FOOT "BUFFER ZONE" IS UNCONSTITUTIONAL*

It is now necessary to consider whether the San Jose Targeted Residential Picketing ordinance is "narrowly tailored to serve" these interests. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (*Frisby* at 485, quoting *City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 808-810.)

The "evil" of targeting picketing is also clear. The *Frisby* court explained that "[t]he devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:

> To those inside . . . the home becomes something less than a home when and while the picketing . . . continues[s] . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility."

(*Frisby*, *supra* at 486, quoting *Carey*, *supra*, 447 U.S. at 478.)

Furthermore, "the type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident." (*Frisby* at 486.) "Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." (*Id.*) For example, the picketers in *Frisby* "subjected the doctor and his family to the presence of a relatively large group of protestors on their doorstep in an attempt to force the doctor to cease performing abortions." (*Id.* at 487.)

In sum, the *Frisby* court explained that "the 'evil' of targeted residential picketing, 'the very presence of an unwelcome visitor

at the home' [citations omitted], is 'created by the medium of expression itself." (*Id* at 487.)

These principles demonstrate that the San Jose Targeted Residential Picketing ordinance seems to be narrowly tailored to serve the interest of protecting the privacy and tranquility of the home. The "evil" of targeted residential picketing is created by unwelcome visitors at the home. San Jose Municipal Code Section 10.090.010 attempts to protect against this evil by prohibiting "picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling." (San Jose Municipal Ordinance Section 10.090.010) This ordinance prevents residents from becoming captives to unwelcome speakers in front of and around their dwellings. As such, it prevents the intrusive and offensive impact of picketing which is targeted at a residential dwelling.

At the hearing of October 8, 1993 in front of the Municipal Court Judge, the City Attorney stated that the basis for the three hundred foot buffer zone was that the City Council thought it was reasonable. (Transcript of Hearing of October 8, 1993, page 18, line 16 *et seq.*)

However, the 300-foot buffer zone has the potential to bar even an otherwise-valid *Gregory* march. The City offers no authority for the proposition that any distance beyond "across the street" or "two houses away" withstands constitutional scrutiny.

As in the *Madsen* decision, *supra*,

> "the 300 foot-zone would ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.' *Ibid.* The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." (*Madsen, supra* at 9280.)

Because of the specific distance proscribed in the statute, this Court is not able to rewrite it.[15]

The City contends that *Madsen* involved an injunction, not an ordinance, and is therefore inapplicable. The *Madsen* court observed that injunctions are remedies imposed for violations or threatened violations of a legislative or judicial decree. The "more rigorous analysis" distinction is irrelevant for the purpose of the size of the zone. The test for an injunction was whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest, the same test under *Ward*.

IV. CONCLUSION[16]

Therefore, San Jose's Targeted Residential Picketing ordinance does not satisfy due process requirements. While it is content neu-

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[15] At the hearing on the present petition, this Court pointed out the difficulties with a legislatively-created buffer zone. Three hundred feet in a neighborhood of small tract homes may be "across town" in some parts of the City of San Jose. In some of the homes in the foothills, 300 feet could be at the entrance to the driveway of a particular home.

Were there a severability clause in the ordinance or some other sound reason, this Court might have been inclined to strike only the 300-foot language. The City has not asked this Court to decide anything other than that the entire ordinance was valid.

[16] In light of this Court's conclusion that the ordinance is unconstitutional, further discussion may not be necessary. As an observation, though, the Court notes that the San Jose Targeted Residential Picketing ordinance otherwise leaves open, ample, and alternative channels of communication. San Jose's targeted residential picketing ordinance does not ban door to door picketing. Picketers may personally contact residents at their homes in order to convey their message. Petitioners may also contact people in residential areas by telephone, through the mail or through other channels of communication including radio and television signals. Finally, as discussed below, the San Jose ordinance does not prohibit picketers from marching through neighborhoods.

For these and other reasons, injunctions that have been tailored to a specific situation by a court have more easily withstood constitutional scrutiny.

tral and it provides fair warning to individuals who seek to comply with the law and explicit standards for those who enforce it, the 300-foot distance is unconstitutional.

The Petition for a writ of mandate is GRANTED. The matter is remanded to the Municipal Court with an order that the Demurrers are to be SUSTAINED.

Costs are awarded to Petitioners. Counsel for Petitioners is to prepare a judgment.

DATED: 8/4/94

/s/ Socrates Peter Manoukian
SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

No. H013078
Superior Court No. 736204

CITY OF SAN JOSE,

Petitioner,

VS.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

TERRY L. THOMPSON, et al.,

Real Parties in Interest.

[Filed March 17, 1995]

BY THE COURT*

The real parties in interest's petition for rehearing is denied.

/s/ Cottle, P.J.

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* Before Cottle, P.J., Premo, J., and Wunderlich, J.

APPENDIX D

Sixth Appellate District No. H013078
S045613

IN THE SUPREME COURT OF CALIFORNIA

THE CITY OF SAN JOSE,

Petitioner,

v.

SANTA CLARA COUNTY SUPERIOR COURT,

Respondent;

TERRY L. THOMPSON, Et Al.,

Real Parties In Interest.

[Filed May 25, 1995]

Real Parties In Interest's petition for review DENIED.

Kennard, J. is of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

Supreme Court, U.S.
FILED
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No. 95-342

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TERRY L. THOMPSON, *et al.*,
Petitioners,

v.

THE CITY OF SAN JOSE,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of California

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BRIEF OF RESPONDENT IN OPPOSITION

JOAN R. GALLO
(Counsel of Record)
GEORGE RIOS
GLENN D. SCHWARZBACH
151 W. Mission Street
San Jose, CA 95110
(408) 277-4454
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The only question properly presented to this Court by Petitioners is Question 1, which states:

> Is an ordinance which prohibits "targeted picketing" within 300 feet of a "targeted residence" an unconstitutionally overbroad restriction on peaceful speech activity?

As explained below at pages 17-18, this Court should not consider the other two (2) issues presented by Petitioners for review because Petitioners have not properly preserved them. Furthermore, question number 3 cannot be raised as a facial challenge to an ordinance.

PARTIES

This matter arises in the context of a criminal action in which Petitioners challenge, by means of demurrer, the constitutionality of the City of San Jose ordinance that they are charged with violating. Accordingly, the Respondent in this matter is properly the People of the State of California, ex rel., City Attorney of the City of San Jose.

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BRIEF OF RESPONDENT IN OPPOSITION

ORDINANCES

Petitioners challenge the constitutionality of Section 10.09.010 of Title 10 of Chapter 10.09 of the San Jose Municipal Code, which provides, in full:

A. No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling.

B. For purposes of this Chapter, the term "residential dwelling" means any permanent building being used by its occupants solely for non-transient residential uses.

C. For purposes of this Chapter, the term "targeted" picketing means picketing activity that is targeted at a particular residential dwelling and

proceeds on a definite course or route in front of or around that particular residential dwelling.

D. This Chapter does not and shall not be interpreted to preclude picketing in a residential area that is not targeted at a particular residential dwelling.

App. A; App. B.

STATEMENT OF THE CASE

On February 9, 1993, Respondent adopted San Jose Municipal Code Section 10.09.010 as an urgency measure following a lengthy public hearing. App. A. Section 10.09.010 was enacted to preserve and protect the right to privacy in the home while leaving ample channels for picketers to exercise their First Amendment rights to peacefully communicate and express their ideas and opinions. *Ibid.* Section 10.09.010 was adopted as an urgency ordinance because there was no law protecting a person's right to privacy in the home against targeted residential picketing, and there were residents of the City of San Jose who were fearful, insecure and intimidated because they had received threats that their homes were to be the immediate target of picketing activity as part of the 1993 "No Place To Hide" antiabortion protests. *Ibid.*

At the public hearing preceding adoption of Section 10.09.010 as an urgency measure, the San Jose City Attorney explained to the City Council that the regulation could not be limited to certain kinds of messages and, in response to a question from a councilmember, stated that the regulation would apply to janitors with work-related grievances who wanted to picket the home of a building owner.[1] Moreover, at the public hearing, one of the

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[1] Respondent attached a transcript of the February 9, 1993, public hearing as Exhibit U of its Exhibits In Support Of Petition For Writ Of Mandate.

Councilmembers recited a list of different types of picketing to which Section 10.09.010 would apply. The fact that the ordinance would apply broadly was one of the reasons that he ultimately voted against adoption of the ordinance.

Following another lengthy public hearing on March 16, 1993, the City of San Jose permanently enacted Section 10.09.010.[2] App. B. At the March 16, 1993, public hearing on the adoption of Section 10.09.010, the San Jose City Attorney explained that the 300-foot buffer zone was determined based on the fact that (1) this is the standard distance used in the City of San Jose to determine land-use impacts and (2) other statutes regulating picketing used a similar distance.[3]

In July, 1993, thirteen (13) of the Petitioners were charged with misdemeanor violations of Section 10.09.010 based on allegations that they engaged in targeted picketing of 798 Harding Street, San Jose, California, on July 10, 1993. In August, 1993, the remaining three (3) Petitioners were charged with violating Section 10.09.010 based on allegations that they engaged in targeted picketing of 798 Harding Street, San Jose, California, on July 15, 1993. Petitioners demurred to the criminal charges on the grounds that Section 10.09.010 is unconstitutional on its face.[4]

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[2] Respondent attached a transcript of the March 16, 1993, public hearing as Exhibit 3 of its Exhibits In Support Of Petition For Writ Of Mandate.

[3] Moreover, as the Court of Appeal states in its decision, the minimum standard lot frontage in San Jose subdivisions is 55 feet and many lots have larger frontages. App. A, p. 10a of Petitioners' Writ of Certiorari. Therefore, the 300-foot buffer zone amounts to, at most, only five and a half homes on either side of the targeted home. *Ibid.*

[4] Because Petitioners have brought a facial challenge to Section 10.09.010, not an "as applied" challenge, the alleged facts regarding the July 10 and 15, 1993 antiabortion demonstrations asserted in Petitioners' Writ of Certiorari at page 3 are irrelevant and should be disregarded.

The Municipal Court overruled the demurrers, concluding that Section 10.09.010 is constitutional. On November 16, 1993, Petitioners filed a petition for writ of prohibition in the Santa Clara County Superior Court, which issued an alternative writ of prohibition directing the Municipal Court and the Respondent to show cause why the requested relief should not be granted.

On August 4, 1994, the Superior Court issued its decision, concluding that Section 10.09.010 is content neutral,[5] serves a significant government interest, leaves open ample alternative channels of communication, and is not unconstitutionally vague. App. B, pp. 30a-37a of Petitioners' Writ of Certiorari. Nevertheless, the Superior Court held that *Madsen v. Women's Health Center, Inc.*, 512 U.S. ——-, [114 S.Ct. 2516] (1994), compelled the conclusion that Section 10.09.010 is unconstitutional because the 300-foot buffer zone is not narrowly tailored.[6] It also reasoned that the buffer zone has the potential of barring demonstrations such as the one approved by this Court in *Gregory v. City of Chicago*, 394 U.S. 111 (1968).

Respondent filed a writ of mandate or prohibition with the Court of Appeal because routine appeals to that Court

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[5] Petitioners incorrectly assert that the Superior Court "did not reach this issue of content-neutrality. . . ." Petitioners' Writ of Certiorari, p. 14. The Superior Court clearly held that the ordinance is content neutral because it does not govern the content of picketing. App. B, pp. 30a-32a of Petitioners' Writ of Certiorari. The Superior Court properly concluded that how the ordinance would be enforced was not at issue because Petitioners were making a facial challenge, not an "as applied" challenge, to Section 10.09.010. *Ibid.*

[6] In its decision, the Superior Court reasoned that, even though *Madsen* involved an injunction rather then an ordinance, it was controlling because injunctions, like ordinances, are subject to the time, place and manner test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). App. B, p. 37a of Petitioners' Writ of Certiorari. This, of course, is incorrect. *See* discussion, *infra*, pp. 10-11.

are not generally available in misdemeanor prosecutions. *See*, App. A, p. 2a of Petitioners' Writ of Certiorari. The Court of Appeal granted review. The Court reasoned that the case was of "sufficient public importance" to warrant review because Respondent had no other remedy at law, and the case implicated the validity of a public law and involved matters that had generated controversy. *Id.* at pp. 2a-3a.

The Court of Appeal concluded that Section 10.09.010 is constitutional. The Court of Appeal reasoned that the only difference between Section 10.09.010 and the targeted picketing ordinance upheld by this Court in *Frisby v. Schultz*, 487 U.S. 477 (1988), was that Section 10.09.010 sets a 300-foot buffer zone whereas the *Frisby* ordinance applied to targeted picketing "before or about" a home. App. A, p. 6a of Petitioners' Writ of Certiorari. Accordingly, just as in *Frisby*, the Court of Appeal held that Section 10.09.010 is content neutral because it applies to all picketers and not just to those who oppose abortion and leaves open ample alternative channels of communication. *Id.* at pp. 4a-5a. The Court of Appeal also found that the "bright line standard" created by the use of the definite 300-foot buffer zone is "far preferable" and "less onerous" than the vague concept of "before or about" contained in the ordinance affirmed by this Court in *Frisby*.[7] *Id.* at p. 6a. The Court of Appeal reasoned that the 300-foot buffer zone leaves no doubt as to how to obey the law and there is less chance of discriminatory or uneven enforcement by the police than the vague "before

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[7] Petitioners' discussion of the use of the terms "far preferable" and "less onerous" by the Court of Appeal is misleading. *See*, Petitioners' Writ of Certiorari, p. 6. Petitioners' discussion of the reasoning of the Court of Appeal decison makes it appear as if the Court of Appeal discussed these terms in the context of analyzing whether Section 10.09.010 is narrowly tailored. This is not correct. The Court of Appeal used these terms in describing Section 10.09.010 in the context of concluding that the ordinance was less vague than the *Frisby* ordinance.

or about" language contained in the *Frisby* ordinance. *Ibid.*

The Court of Appeal held that the 300-foot buffer zone constituted a reasonable legislative choice and is, therefore, narrowly tailored. App. A, pp. 7a-13a of Petitioners' Writ of Certiorari. The Court of Appeal concluded that *Madsen* was not controlling because that case involved an injunction, which is subject to a more rigorous standard of review than an ordinance such as Section 10.09.010. *Id.* at 3a, 7a, 10a-13a. In finding the 300-foot buffer zone constitutional under the standard of review applicable to ordinances, the Court of Appeal relied upon the fact that (1) a variety of decisions, including United States Supreme Court cases, have upheld the use of buffer zones similar in size to the one at issue here in regulating First Amendment activities, (2) buffer zones of similar size are commonly used in legislative enactments, (3) 300 feet is commonly used as the buffer zone in stay away orders issued in harassment injunction lawsuits, and (4) 300 feet is consistent with the standard notice requirements set forth in local state laws for land-use decisions. *Id.* at pp. 7a-9a. The Court of Appeal also found the 300-foot buffer zone was reasonable based on the fact that it amounted, at most, to a zone of five and a half homes on either side of the targeted home. *Id.* at p. 10a.

On March 2, 1995, Petitioners filed a petition for rehearing with the Court of Appeal. Petitioners did **not** raise as a ground for seeking rehearing that the Court of Appeal failed to address their arguments that (1) the term "targeted" is unconstitutionally vague and (2) Section 10.09.010 is a content-based restriction on speech based on City Attorney representations to the lower courts. The Court of Appeal denied the motion on March 17, 1995.

The Petitioners subsequently sought review by the California Supreme Court on substantially the same three

(3) issues upon which they seek review by this Court. They argued, *inter alia*, that the Court of Appeal erred in failing to address their vagueness and "content-neutrality" arguments. Respondent opposed the petition for review on the ground that the Court of Appeal had correctly decided the matter. They further opposed review of Petitioners' vagueness and "content-neutrality" issues on the ground that, pursuant to Rule 29, subdivision (b)(2) of the California Rules of Court, these issues were not appropriate for review because the omission of these issues from the Court of Appeal decision was not brought to the attention of the Court of Appeal in the petition for rehearing.[8] The California Supreme Court denied the petition for review on May 25, 1995.

REASONS THAT REVIEW SHOULD BE DENIED

Review of Section 10.09.010 by this Court is not warranted. This Court has already addressed the constitutionality of targeted picketing ordinances in *Frisby v. Schultz, supra*, 487 U.S. 474 (1988). Likewise, it has already addressed the use of buffer zones similar to the one at bar in legislation regulating First Amendment activity in *Burson v. Freeman*, 504 U.S. 191 (1992), *Boos v. Barry*, 485 U.S. 312 (1984), and *Cox v. Louisiana*, 379 U.S. 559 (1965). Relying substantially upon these authorities, the Court of Appeal decision correctly concluded that Section 10.09.010 is constitutional. Petitioners' assertion that many government entities have adopted targeted picketing ordinances does not demonstrate a need for judicial review. Moreover, their con-

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[8] Rule 29, subdivision (b)(2) of the California Rules of Court provides, in relevant part:

> As a matter of policy, on petition for review the Supreme Court normally will not consider . . . any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. . . .

tention that the decision of the Court of Appeal conflicts with other case authority is based on a misreading of the breadth of Section 10.09.010 and of those authorities.

I. THE COURT OF APPEAL CORRECTLY CONCLUDED THAT SECTION 10.09.010 IS NARROWLY DRAWN TO SERVE THE SIGNIFICANT GOVERNMENT INTEREST OF PROTECTING RESIDENTIAL PRIVACY.

This Court has repeatedly stated that protecting residential privacy is a significant government interest. *See, e.g., Frisby v. Schultz, supra,* 487 U.S. at 484-487; *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 742-751 (1978); *Rowan v. United States Post Office,* 397 U.S. 728, 735-737 (1970). While people can normally avoid speech while out in public, this Court has recognized the unique nature of the home as being the " 'last citadel of the tired, the weary, and the sick' . . ." and " 'the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits'. . . ." *Frisby, supra,* 487 U.S. at 484. Because of the unique nature of the home, this Court has repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. *Id.* at 485.

This Court also recognized in *Frisby* that, unlike more general means of communication, picketers targeting a particular home "do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way." *Id.* at 486. This Court reasoned that, "even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." *Ibid.* Noting that targeted picketing has a devastating effect on the quiet enjoyment of the home, this Court stated:

> " 'To those inside . . . the home becomes something less than a home when and while the picketing . . .

> continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.' "

Citations omitted. *Id.* at 486. This Court concluded that "even a solitary picket can invade residential privacy." *Id.* at 487.

The Court of Appeal decision in this case correctly concluded that Section 10.09.010 is narrowly tailored to serve the significant government interest of protecting residential privacy. Section 10.09.010 only prohibits "targeted" picketing within 300 feet of a residential dwelling. For purposes of the ordinance, "targeted" is very narrowly defined to require that the picketing is *both* (1) targeted or focused at a residential dwelling and (2) proceeds on a definite course or route in front of or around that dwelling that is the focus of the picketing. Thus, Section 10.09.010 does not interfere with the right of demonstrators to hold general neighborhood marches, to use mailings or leaflets, or to go door to door proselytizing. Nor does it prohibit picketing that focuses on a home if it occurs beyond 300 feet of the targeted dwelling, or if it does not otherwise proceed on a definite course or route in front of or around the home at which the picketing is directed.

Moreover, the abundant authorities cited by the Court of Appeal clearly reflect the reasonableness of the legislative choice to create a buffer zone of 300 feet, which amounts to no more than five and a half homes on each side of the targeted home. *See,* discussion, *supra,* p. 6. These authorities included this Court's decisions in *Boos v. Berry, supra,* 485 U.S. 312, which upheld a provision of a statute making it unlawful to congregate within 500 feet of any foreign embassy and to refuse to disperse after having been ordered to do so by police, *Burson v. Freeman, supra,* 504 U.S. 191, which upheld a statute prohibiting solicitation of votes and the display or distribu-

tion of campaign literature within 100 feet of a polling place because "the minor geographic limitation" did not significantly impinge on constitutionally protected rights,[9] and *Cox v. State of Louisiana, supra,* 379 U.S. 559, 568, fn. 1, which upheld an ordinance prohibiting picketing "near" a courthouse and cited the law at issue in *Boos* as being less vague due to the specification of 500 feet. The assertion of Petitioners that only one of the many authorities relied upon by the Court of Appeal involved residential picketing does not diminish the fact that these authorities overwhelmingly reflect the reasonableness of the legislative choice to use a 300-foot buffer zone. *See,* Petitioners' Writ of Certiorari, p. 6.

In concluding that Section 10.09.010 is narrowly tailored, the Court of Appeal decision correctly distinguished this Court's decision in *Madsen* because that case involved an injunction, not an ordinance. As the Court of Appeal explained in its decision, in analyzing the injunction at issue in *Madsen,* this Court reasoned that the time, place and manner analysis applicable to ordinances is not sufficiently rigorous for evaluating content-neutral injunctions because (1) unlike ordinances, which represent legislative choices regarding the promotion of particular societal interests, injunctions are remedies imposed for violations or threatened violations of legislative or judicial decrees, and (2) injunctions carry greater risks of censorship and discriminatory application than general ordinances. 512 U.S. —— [114 S.Ct. 2524-2525]. Accordingly, this Court concluded that, unlike a general ordinance, a content-neutral injunction is valid only if its

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[9] In upholding the constitutionality of the 100-foot buffer zone, this Court stated:

> . . . we simply do not view the question of whether the 100 foot boundary line could be somewhat tighter as a question of "constitutional dimension." . . . [Citations omitted] . . . Reducing the boundary to 25 feet . . . is difference in degree, not a less restrictive alternative in kind.

Id. at 210.

provisions "burden no more speech than necessary to serve a significant government interest." *Ibid.* On the other hand, this Court stated that content-neutral time, place and manner ordinances are constitutional if they meet the lower threshold of being narrowly tailored to serve a significant government interest.[10] *Ibid.*

The Court of Appeal correctly stated in its decision that the greater deference given to ordinances by this Court in *Madsen* is not arbitrary or a trivial or gratuitous part of the opinion, as suggested by Petitioners. App. A, pp. 12a-13a of Petitioners' Writ of Certiorari. The Court of Appeal stated that this deference is a result of the checks and balances built into our political system and the doctrine of separation of powers. *Ibid.* It further explained that the judiciary does not have plenary powers of review over the legislature, for it is not a judicial function to write statutes. *Ibid.* On the other hand, injunctions are crafted by trial courts and it is the job of reviewing courts to review trial courts. *Ibid.* Accordingly, the appellate court has broad powers of review over injunctions. *Ibid.*

In short, the Court of Appeal correctly concluded that Section 10.09.010 is narrowly tailored to serve the significant government interest of protecting residential privacy.

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[10] Under the "narrowly tailored" standard applicable to ordinances, a regulation need not be the least restrictive or least intrusive means, so long as it promotes a substantial government interest that would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism, supra,* 491 U.S. at 798-799. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Thus, this test is significantly less rigorous than the standard set forth in *Madsen* for analyzing injunctions.

II. THE ASSAULT ON RESIDENTIAL PRIVACY RESULTING FROM THE INCREASING USE OF TARGETED PICKETING HAS RESULTED IN AN INCREASING NUMBER OF GOVERNMENT ENTITIES ADOPTING LEGISLATION REGULATING SUCH CONDUCT.

Petitioners assert that review of Section 10.09.010 is necessary because a growing number of government entities have enacted legislation regulating picketing activity focused on a particular residence. Petitioners' Writ of Certiorari, pp. 4-5. As Petitioners acknowledge, many of these laws simply track, in substantial part, the language of the targeted picketing ordinance approved by this Court in *Frisby*. Moreover, an increasing number of citizens in cities and counties throughout this nation have been subject to residential targeted picketing. This assault on residential privacy has led to the need for legislatures to enact regulations to protect this significant government interest. The fact that many government entities have found it necessary to adopt legislation to address a widespread problem does not reflect a need for judicial review of Section 10.09.010.

III. PETITIONERS' ATTEMPT TO CREATE A CONFLICT BETWEEN THE COURT OF APPEAL DECISION AND THE DECISIONS OF THIS COURT IS MERITLESS.

Petitioners assert that the Court of Appeal decision conflicts with this Court's conclusion in *Madsen* that a provision of an injunction containing a 300-foot buffer zone was unconstitutional. Petitioners' Writ of Certiorari, p. 11. However, as explained above, *Madsen* is not applicable to this matter because it involved an injunction, which is subject to a more rigorous analysis than an ordinance. *See*, discussion, *supra*, pp. 10-11. Additionally, Petitioners simply ignore the fact that the provision of the injunction at issue in *Madsen* was substantially broader than either

Section 10.09.010 or the targeted picketing ordinance upheld by this Court in *Frisby*. It prohibited not only targeted picketing, but completely banned all "approaching, congregating, picketing, patrolling, [or] demonstrating" within 300 feet of residences of clinical employees, staff, owners or agents." [11] *Madsen, supra*, 512 U.S. ——, [114 S.Ct. at 2522.]

Petitioners also contend that the Court of Appeal decision conflicts with *Frisby*, in which this Court construed the ambiguous phrase "before or about the residence" as banning "focused picketing taking place solely in front of a particular residence. . . ." 487 U.S. at 483. As Petitioners acknowledge, this construction was based upon representations of the attorney for the town adopting the targeted picketing ordinance as to the meaning of this ambiguous phrase. *Id.* at 483. This Court merely held that the ordinance at issue in *Frisby*, as construed, did not run afoul of the First Amendment. *Id.* at 485-488. It did not set out to prescribe what a constitutional regulation might look like in every instance, and did not hold that a targeted residential picketing ordinance creating a limited buffer zone around a residence runs afoul of the First Amendment. Indeed, as discussed in the Court of Appeal decision, this Court has upheld restrictions on First-Amendment activities involving buffer zones. *See*, discussion, *supra*, pp. 9-10.

Finally, Petitioners assert that the Court of Appeal decision conflicts with this Court's decision in *Gregory v. City of Chicago, supra*, 394 U.S. 111. However, unlike

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[11] Furthermore, in striking the injunction, this Court in *Madsen* held that the record did not contain sufficient justification for such a broad ban on First Amendment activity. 512 U.S. —— [114 S.Ct. at 2530]. This implies that upon a proper showing even the broad ban on First Amendment activity at issue in *Madsen* could be constitutional under the more rigorous standard of review that is applicable to injunctions. Thus, the Supreme Court's analysis in *Madsen* tends to support the constitutionality of Section 10.09.010.

the present case, *Gregory* involved criminal charges of disorderly conduct and did not require this Court to address the constitutionality of a residential picketing ordinance such as Section 10.09.010. The concurring opinion of Justice Black notes that, although the City of Chicago did not have such an ordinance, adoption of such a law would constitute a proper exercise of governmental authority. *Id.* at 114-127. Almost twenty (20) years after *Gregory*, this Court in *Frisby* squarely decided the issue not addressed in *Gregory*, i.e. that the government can enact and enforce a narrowly drawn law regulating tageted residential picketing.

IV. PETITIONERS' ATTEMPT TO CREATE A CONFLICT BETWEEN THE COURT OF APPEAL DECISION AND THE DECISIONS OF STATE AND FEDERAL COURTS IS MERITLESS.

Petitioners incorrectly assert that the Court of Appeal decision conflicts with *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), which, unlike this case, involved a challenge by abortion protesters to an ordinance that the Sixth Circuit interpreted as completely banning all residential picketing. The Sixth Circuit held that such a ban on residential picketing is "inconsistent with the most recent pronouncements of the Supreme Court. . . ." 43 F.2d at 1107. In reaching this conclusion, the Sixth Circuit recognized that the ordinance at issue was identical to the one that this Court in *Frisby* found to be unconstitutionally overbroad as written but construed narrowly in order to save it. *Id.* at 1106. Nevertheless, the Sixth Circuit refused to construe the ordinance before it to be constitutional for a number of reasons, including the fact that the ordinance was adopted long after the *Frisby* decision and thus should not have been so broadly written. *Ibid.* In essence, the Sixth Circuit concluded that the ordinance in *Frisby* would not have been constitutional absent the Supreme Court's nar-

rowing construction and that, therefore, in adopting such an ordinance, the legislative body should have expressly drafted the necessary limiting language.

As Petitioners state, the Sixth Circuit in *Vittitow* also struck an injunction regulating targeted picketing entered by the trial court to limit enforcement of the ordinance. This portion of the Sixth Circuit's opinion is not relevant to this matter since it was decided after *Madsen* and involved an injunction, not an ordinance.

The Petitioners also incorrectly assert that the Eighth Circuit's recent decision in *Kirkeby v. Furness,* 52 F.3d 772 (8th Cir. 1995) conflicts with the Court of Appeal decision. However, the ordinance at issue in *Kirkeby* was substantially broader than Section 10.09.010. The ordinance at issue in *Kirkeby* defined "targeted residential picketing" as simply the act of carrying any written material or verbalizing protests within 200 feet of a dwelling that identifies the occupants of the dwelling. 52 F.3d at 774. Moreover, the ordinance defined "picketing" as including simply "maintaining a physical presence . . . for the purpose of persuading the public or an occupant of such premises or to protest some action, attitude or belief." *Ibid.* Therefore, the ordinance at issue in *Kirkeby* is not narrowly tailored to protect residential privacy. Simply identifying an individual living in a neighborhood and being present within the buffer zone, which would violate the ordinance at issue in *Kirkeby,* would not violate Section 10.09.010. As previously discussed, Section 10.09.010 requires that the picketing focus on a particular home and proceed in a definite course or route in front of or around the home. Accordingly, the *Kirkeby* case has no application here.

Petitioners' contention that *Murray v. Lawson,* 138 N.J. 206, 649 A.2d 1253 (N.J. 1994), conflicts with the Court of Appeal decision is also misplaced because that case was decided after *Madsen* and involved an injunction,

not an ordinance.[12] Finally, Petitioners' reliance on *Ramsey v. Edgepark, Inc.*, 66 Ohio App.3d 99, 583 N.E.2d 443 (1990), is without merit. That case involved an injunction that, rather than prohibiting only targeted picketing, prohibited the defendants from taking photographs of plaintiffs family member and from engaging in any type of demonstrations within 200 feet of plaintiff's home. 66 Ohio App.3d at 102-103, 583 N.E.2d at 446. Not surprisingly, the Ohio state appellate court held that this was not proper and struck down the provision, stating, *inter alia*, that there is no invasion of appellee's privacy as long as the picketers remain on public property and do not focus their activities solely at a particular home. 66

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[12] Moreover, the injunction at issue in *Murray* was substantially broader than Section 10.09.010 in that it prohibited "picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of [plaintiff's] residence. . . ." 138 N.J. at 211, 649 A.2d at 1256. The New Jersey Supreme Court struck the injunction after concluding the record was inadequate to support the injunction because it failed to explain why the trial court chose 300 feet. 138 N.J. at 228-231, 649 A.2d at 1265-1266. Furthermore, the Court modified the injunction in a manner that causes it to be substantially more restrictive of free speech than Section 10.09.010. The injunction, as modified by the New Jersey Supreme Court, states that defendants:

> (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the [plaintiff's] residence . . .;
>
> (2) may picket in a group of no more than ten persons outside the 100-foot zone around the [plaintiff's] residence for one hour every two weeks;
>
> (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing.

Emphasis added. 138 N.J. at 233-235, 649 A.2d at 1267-1268. This Court denied review of this case. 63 U.S.L.W. 3845 (U.S. May 30, 1995) (94-1450).

Ohio App.3d at 111, 583 N.E.2d at 452. Accordingly, *Ramsey* is inapposite.

V. PETITIONERS' VAGUENESS AND CONTENT-NEUTRALITY CONTENTIONS DO NOT RAISE ANY ISSUES APPROPRIATE FOR REVIEW BY THIS COURT.

Issues one and two contained in Petitioners' Writ of Certiorari, which assert that Section 10.09.010 is vague and not content neutral, are not properly before this Court. Neither of these issues was specifically addressed in the California Court of Appeal decision. *See,* discussion, *supra,* pp. 6-7. Because Petitioners did not raise these contentions in their petition for rehearing before the Court of Appeal they were not properly raised before the California Supreme Court. *Ibid.* Given that Petitioners did not properly preserve these issues, they should not now be permitted to assert them before this Court.

Even if these issues were properly being raised before this Court, they do not provide an appropriate basis for reviewing this case. The Court of Appeal correctly concluded that Section 10.09.010 is content neutral because it does not refer to any particular speech. Moreover, upon adoption of the ordinance, Respondents made it clear that Section 10.09.010 would be applicable to all targeted picketing irrespective of the message and they have maintained throughout these proceedings that this would be the case.

Petitioners also make a very convoluted argument in an attempt to make it appear as if the term "targeted," as used in Section 10.09.010, is vague. Petitioners' Writ of Certiorari, pp. 12-13. As previously discussed, the term "targeted," as used in Section 10.09.010, is given a very specific and narrow definition. *See,* discussion, *supra,* p. 9, The definition uses the word "targeted," which this Court in *Frisby* used interchangeably with the words "focused"

picketing and picketing directed at a residence. *Frisby, supra,* 487 U.S. at 483, 486, 487. As Respondent asserted below, an individual can be the target or focus of picketing regardless of distance. For example, an individual can be the target or focus of a City-wide, State-wide or County-wide negative newspaper, television, or mailing campaign regardless of were the individual lives. Similarly, an individual living in one residential neighborhood can be the target or focus of picketing occurring in another neighborhood. However, Respondent has defined this term more narrowly for purposes of Section 10.09.010 by regulating picketing targeted or focused on an indivdual only when it (1) occurs within 300 feet of the individual's home and (2) proceeds on a definite course or route in front of or around such home.

Petitioners' contentions with regard to statements by the Office of the San Jose City Attorney with regard to the theoretical scenarios under which the City would enforce the ordinance are relevant only to an "as applied" challenge, not the facial challenge that they have brought against Section 10.09.010.

CONCLUSION

For the above reason, the Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

JOAN R. GALLO
(Counsel of Record)
GEORGE RIOS
GLENN D. SCHWARZBACH
151 W. Mission Street
San Jose, CA 95110
(408) 277-4454
Attorneys for Respondent

APPENDIX A

ORDINANCE NO. 24292

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING TITLE 10 OF THE SAN JOSE MUNICIPAL CODE BY ADDING A NEW CHAPTER 10.09 ADOPTED AS AN URGENCY MEASURE TO PROHIBIT TARGETED PICKETING OF RESIDENCES; AND SETTING FORTH THE FACTS CONSTITUTING SUCH URGENCY

WHEREAS, the preservation and protection of the right to privacy in the home and the enjoyment of tranquility, well-being and sense of security in the home are in the public interest and are uniquely and critically important to the public health, safety and welfare; and

WHEREAS, picketing activity that is targeted at a particular residence or household whose occupants do not welcome such activity may harass and intimidate such occupants, is inherently and unreasonably offensive to and intrusive upon the right to privacy in the home and may cause the occupants of such home to experience great emotional distress; and

WHEREAS, such unwelcome and targeted picketing activity creates a "captive audience" situation because the occupants of a residence or household cannot readily move to another residence or household in order to avoid the unwelcome picketing activity being directed at them; and

WHEREAS, this "captive audience" situation and the protection of the right to privacy in the home requires the enactment of a reasonable time, place and manner restriction upon such unwelcome picketing activity that is targeted at a particular residence or household; and

WHEREAS, this ordinance is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of picketers to peacefully

communicate and express their ideas and opinions and the rights of persons to enjoy the right to privacy in their homes; and

WHEREAS, this ordinance is not intended to preclude the right to picket in a residential area generally and in such a manner that does not target or focus upon a particular residence or household; and

WHEREAS, existing law does not adequately protect the right to privacy in the home against such targeted picketing activity;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Title 10 of the San Jose Municipal Code is hereby amended by adding a new Chapter to be numbered and entitled and to read as follows:

CHAPTER 10.09
TARGETED RESIDENTIAL PICKETING

10.09.010. *Targeted Residential Picketing Prohibited.*

A. No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling.

B. For purposes of this Chapter, the term "residential dwelling" means any permanent building being used by its occupants solely for nontransient residential uses.

C. For purposes of this Chapter, the term "targeted" picketing means picketing activity that is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling.

D. This Chapter does not and shall not be interpreted to preclude picketing in a residential area that is not targeted at a particular residential dwelling.

10.09.020. *Private Right of Action.*

A. Any person who is aggrieved by an act prohibited by this Chapter may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate, or proposes to violate the provisions of this Chapter.

B. Any aggrieved person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages or relief, the court may award to the aggrieved person a civil penalty of up to One Thousand Dollars ($1,000.00) for each violation of this Chapter.

C. The remedies provided by this Chapter are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive.

SECTION 2. This ordinance is an urgency measure necessary to protect the public health, safety and welfare and shall become effective immediately upon adoption pursuant to City Charter Section 605(d). The facts constituting such urgency are that: (i) there currently is no law protecting a person's right to privacy in the home against targeted residential picketing activity that unreasonably interferes with such privacy right, and (ii) there are residents of the City of San Jose who are fearful because they have received threats that targeted picketing activity is being planned to take place at their homes and, as a result of these threats, these residents feel intimidated and are made insecure.

SECTION 3. This urgency ordinance shall remain in effect for a maximum period of ninety (90) days and

shall be superceded by the adoption of Ordinance No. 24292.

ADOPTED IN ACCORDANCE WITH CITY CHARTER SECTION 605(d) this 9th day of February, 1993, by the following vote:

AYES: ALVARADO, BEALL, FERNANDES, HEAD, JOHNSON, POWERS, SHIRAKAWA; HAMMER

NOES: COLE, FISCALINI, PANDORI

ABSENT: NONE

SUSAN HAMMER
Mayor

ATTEST:

PATRICIA L. O'HEARN
City Clerk

APPENDIX B

ORDINANCE NO. 24321

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING TITLE 10 OF THE SAN JOSE MUNICIPAL CODE BY ADDING A NEW CHAPTER 10.09 TO PROHIBIT TARGETED PICKETING OF RESIDENCES

WHEREAS, the preservation and protection of the right to privacy in the home and the enjoyment of tranquility, well-being and sense of security in the home are in the public interest and are uniquely and critically important to the public health, safety and welfare; and

WHEREAS, picketing activity that is targeted at a particular residence or household whose occupants do not welcome such activity may harass and intimidate such occupants, is inherently and unreasonably offensive to and intrusive upon the right to privacy in the home and may cause the occupants of such home to experience great emotional distress; and

WHEREAS, such unwelcome and targeted picketing activity creates a "captive audience" situation because the occupants of a residence or household cannot readily move to another residence or household in order to avoid the unwelcome picketing activity being directed at them; and

WHEREAS, this "captive audience" situation and the protection of the right to privacy in the home requires the enactment of a reasonable time, place and manner restriction upon such unwelcome picketing activity that is targeted at a particular residence or household; and

WHEREAS, this ordinance is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of picketers to peacefully communicate and express their ideas and opinions and

the rights of persons to enjoy the right to privacy in their homes; and

WHEREAS, this ordinance is not intended to preclude the right to picket in a residential area generally and in such a manner that does not target or focus upon a particular residence or household; and

WHEREAS, existing law does not adequately protect the right to privacy in the home against such targeted picketing activity;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Title 10 of the San Jose Municipal Code is hereby amended by adding a new Chapter to be numbered and entitled and to read as follows:

CHAPTER 10.09
TARGETED RESIDENTIAL PICKETING

10.09.010. *Targeted Residential Picketing Prohibited.*

A. No person shall engage in picketing activity that is targeted at and is within three hundred (300) feet of a residential dwelling.

B. For purposes of this Chapter, the term "residential dwelling" means any permanent building being used by its occupants solely for nontransient residential uses.

C. For purposes of this Chapter, the term "targeted" picketing means picketing activity that is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling.

D. This Chapter does not and shall not be interpreted to preclude picketing in a residential area that is not targeted at a particular residential dwelling.

10.09.020. *Private Right of Action.*

A. Any person who is aggrieved by an act prohibited by this Chapter may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate or proposed to violate the provisions of this Chapter.

B. Any aggrieved person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages or relief, the court may award to the aggrieved person a civil penalty of up to One Thousand Dollars ($1,000.00) for each violation of this Chapter.

C. The remedies provided by this Chapter are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive.

PASSED FOR PUBLICATION OF TITLE this 16th day of March, 1993, by the following vote:

AYES: ALVARADO, BEALL, FERNANDES, HEAD, JOHNSON, POWERS, SHIRAKAWA; HAMMER

NOES: COLE, FISCALINI, PANDORI

ABSENT: NONE

/s/ Susan Hammer
SUSAN HAMMER
Mayor

ATTEST:

/s/ Patricia L. O'Hearn
PATRICIA L. O'HEARN
City Clerk